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EQUAL ACCESS TO JUSTICE ACT

TAX DIVISION MANUAL:

STATEMENT OF POLICIES AND GUIDELINES

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EQUAL ACCESS TO JUSTICE ACT

TAX DIVISION MANUAL: STATEMENT OF POLICIES AND GUIDELINES

I. GENERAL OVERVIEW.

A. Purpose.

The Equal Access to Justice Act, Pub. L. No. 96-481, Title II, 94 Stat. 2321, 2325 (the Act), enacted on October 21, 1980, effective October 1, 1981, authorizes the award of attorney fees and other expenses against the United States in certain civil proceedings and under certain conditions. The Act is premised on the Congressional finding that certain individuals, businesses, and other organizations may be deterred from defending against "unreasonable" governmental civil action because of the expense involved. In Congress' view the greater resources and expertise of the United States demand that, in certain situations, the United States be liable for attorney fees, although a private litigant would not be liable. In addition, the Act also waives sovereign immunity to provide for the applicability of, in actions by or against the United States, the common law and statutory exceptions to the "American rule" respecting the award of attorney fees. 1/

B. Scope.

The Act is comprised of two principal sections. It provides for the award of fees and other expenses in certain "agency actions" and in certain "judicial proceedings."

1/ Sec. 202 of the Act.

1. Agency actions.

Section 203 of the Act amends the Administrative Procedure Act, 5 U.S.C., by adding new Section 504 which provides that attorney fees may be awarded in agency adjudications conducted pursuant to 5 U.S.C., Section 554. Section 554(a) applies:

> [I]n every case of an adjudication required by statute to be determined on the record after an opportunity for an agency hearing, except to the extent that there is involved--
>
> > (1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

* * * * *

Internal Revenue Service determinations of tax liability or actions to collect taxes are matters "subject to a subsequent trial of the law and the facts de novo in a court." Moreover, it has been recognized that tax liability determinations are not subject to the requirements of the Administrative Procedure Act. 2/

Advance ruling and technical advice proceedings are similarly excluded from coverage under the "agency actions" section of

---

2/ See Salman v. Swanson, 80-2 U.S.T.C., para. 9574 (Nev. May 30, 1980). Also see Kennedy Name Plate Co. v. Commissioner, 170 F. 2d 196 (9th Cir. 1948); Cohen v. Commissioner, 176 F. 2d 394 (10th Cir. 1949); O'Dwyer v. Commissioner, 266 F. 2d 575 (4th Cir. 1959).

the Act. Accordingly, the Act has no applicability to Internal Revenue Service administrative tax determination and collection proceedings.

2. Judicial proceedings.

The Act's provisions regarding "judicial proceedings" are applicable to many civil proceedings handled by Tax Division attorneys in the federal court system. Under the American rule, each party is generally responsible for the payment of his or her own attorney fees and other expenses incurred during litigation. In the case of civil actions brought by or against the United States, 28 U.S.C., Section 2412, has provided since 1966 that costs, but not attorney fees, could be awarded against the United States, unless otherwise specifically provided by statute.

The Act makes two essential changes in the Section 2412 rule prohibiting awards of attorney fees against the United States except where mandated by statute: first, new Section 2412(b) makes the United States liable for fees and expenses of attorneys to the same extent that any other party would be liable under the common law exceptions to the American rule and under statutes that provide for a fee award; and second, new Section 2412(d) provides that in civil actions (other than tort actions) pending between October 1, 1981, and September 30, 1984, brought by or against the United States, federal courts shall award attorney fees, expert witness fees, and other described expenses of litigation to qualifying parties who prevail against the United States, unless the position of the United States as a party to the proceeding was substantially justified or special circumstances make an award unjust.

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Finally, the Act amends Rule 37 of the Federal Rules of Civil Procedure by deleting subparagraph (f) which heretofore prohibited the award of expenses and fees against the United States under the rule.

C. Legislative history.

The process which culminated in enactment of the Act began with hearings during the 93d, 94th, and 95th Congresses. 3/ In the 95th Congress, the Senate passed an earlier version of the Act as part of the Legal Services Corporation Act Amendments of 1977 4/ but the amendment was deleted in conference.

In the 96th Congress, the Senate sponsors of the Act introduced the legislation as S. 265, 96th Cong., 1st Sess. (1979). After hearings, 5/ the bill cleared the Senate Judiciary Committee unanimously and passed the Senate on July 31, 1979, by a vote of 94 to 3.

In the House, numerous similar bills were referred to the Judiciary Committee; one of those bills, H.R. 6429, 96th Cong., 2d Sess. (1980), the Small Business Equal Access to Justice Act, was jointly referred to the Judiciary and Small Business Committees.

3/ The legislative history of the Act is contained in Appendix F, *infra*.

4/ 123 Cong. Rec. S17018-S17026 (daily ed. Oct. 12, 1977).

5/ Hearings were held in the Senate Judiciary Subcommittee on Improvements in Judicial Machinery on April 19, 20, and 21, 1979; the bill was subsequently reported by the Senate Judiciary Committee on July 20, 1979. S. Rep. No. 96-253, 96th Cong., 1st Sess.

Both of those Committees held hearings 6/ on the fee-shifting concept. The Small Business Committee favorably reported H.R. 6429 by unanimous vote on May 13, 1980, 7/ and the Judiciary Committee favorably reported S. 265 (similar but not identical to H.R. 6429 and the Senate version of the same bill) by voice vote on September 24, 1980. 8/

Although plans were under way to take S. 265 to the House floor in the normal course, the Senate on September 26, 1980, attached the text of the House Judiciary Committee version of S. 265 to a House-passed small business measure, H.R. 5612, 96th Cong., 2d Sess. (1980). The House conferees ultimately agreed with the Senate provision. The Conference Report 9/ on H.R. 5612 was filed on September 30, 1980.

For procedural reasons, the Conference Report was never adopted. Instead, the House on October 1, 1980, amended the Senate amendments to H.R. 5612, adding one provision to the

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6/ Hearings were held by the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice on May 20 and June 24, 1980, on S. 265 and related attorney fee bills including H.R. 6429, 96th Cong., 2d Sess. (1980). The Small Business Subcommittee on SBA and SBIC Authority and General Small Business Problems held hearings on April 17, 23, and May 1, 1980.

7/ H.R. Rep. No. 96-1005, pt. 1, 96th Cong., 2d Sess.

8/ H.R. Rep. No. 96-1418, 96th Cong., 2d Sess.

9/ H.R. Conf. Rep. No. 96-1434, 96th Cong., 2d Sess.

Senate-passed bill, a requirement for a prior appropriation. The Senate concurred in the House amendments later that day. 10/ President Carter signed H.R. 5612 on October 21, 1980, and it became Public Law 96-481, 94 Stat. 2321.

Because of the convoluted history of the Act, the primary legislative history consists of the reports of the Senate and House Judiciary Committees on S. 265, the report of the House Small Business Committee on H.R. 6429, and the Conference Report on H.R. 5612.

As initially passed by the Senate on July 31, 1979, S. 265 contained a six-month delayed effective date for tax cases. 11/ The purpose of that provision was to allow consideration by the tax-writing committees of attorney fees legislation specifically designed for tax cases. The Senate Finance Committee subsequently conducted hearings on S. 1444, 96th Cong., 1st Sess. (1979), the Taxpayer Protection and Reimbursement Act. The Ways and Means Committee also conducted a hearing on this subject. 12/

Similar legislation has been introduced in the 97th Congress as S. 752, 97th Cong., 1st

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10/ 126 Cong. Rec. S14210-S14215 (daily ed. Oct. 1, 1980).

11/ 126 Cong. Rec. S10919 (daily ed. July 31, 1979).

12/ *Hearing before the Subcommittee on Oversight of the Internal Revenue Service of the Committee on Finance, United States Senate*, 96th Cong., 1st Sess. (1979); *Hearing before the Subcommittee on Select Revenue Measures of the Committee on Ways and Means, House of Representatives*, 96th Cong., 2d Sess. (1980).

Sess. (1981) and H.R. 3262, 97th Cong., 1st Sess. (1981). The future of this legislation is unclear.

A close reading of the Act will reveal a number of gaps and ambiguities concerning its application. Legislation to amend the Act was introduced in the 97th Congress as S. 1223, 97th Cong., 1st Sess. (1981). In addition, the House-passed version of the Budget Reconciliation Act 13/ contained a number of amendments to the Act, but these provisions were deleted in conference.

D. Legal context.

The Act 14/ directs agencies to establish uniform procedures for the award of fees in their administrative proceedings, after consultation with the Chairman of the Administrative Conference of the United States (ACUS). 15/

ACUS has developed model regulations to assist agencies in establishing their own regulations pursuant to the requirements of the Act. Draft model regulations appeared in the Federal Register on March 10, 1981. 16/

13/ H.R. 3882, 97th Cong., 1st Sess. (1981).

14/ Sec. 504(c)(1) of the Act.

15/ ACUS was established as a permanent independent federal agency by the Administrative Conference Act of 1964, 5 U.S.C., Sections 571 through 576. Its purpose is to identify the causes of inefficiency, delay and unfairness in administrative proceedings affecting private rights, and to recommend improvements to the President, the agencies, the Congress, and the courts.

16/ 46 Fed. Reg. 15895 (March 10, 1981).

After a period for public comment the regulations were revised and issued in their final form. 17/ During the public comment period, the Justice Department criticized the draft regulations by letter dated May 12, 1981, from Edward C. Schmults, Deputy Attorney General.

Since the ACUS model regulations apply only to administrative proceedings, they are largely irrelevant to the award of fees and other expenses under the Act in judicial proceedings. Many of the terms contained in the "agency action" portion, however, are identical to those in the "judicial proceedings" section of the Act. It is anticipated, therefore, that the ACUS model rules will be cited as interpretative authority in future judicial award proceedings under the Act. Since the ACUS regulations do not reflect Department of Justice interpretations in a number of respects, the Tax Division will not cite those regulations as authority. 18/

The legal context for early interpretation of the Act also includes many federal statutes authorizing the award of attorney fees. 19/ These statutes were enacted for many

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17/ 46 Fed. Reg. 32900 (June 25, 1981).

18/ The Department of Justice regulations implementing the Act with respect to agency adjudications will be procedural in nature and, contrary to the ACUS model, will not contain substantive interpretations. The Department's proposed regulations appear in 46 Fed. Reg. 48921 (October 5, 1981).

19/ The text of these statutes is set out in Hearings before the Subcommittee on Courts, Civil Liberties, and the Administration of (footnote continued) different purposes and use varying language. Some of the case law will be relevant, however, especially where the statutes use language identical with the Act. The legislative history of the Act specifically notes that the definition of the term "prevailing party" used in the Act has been the subject of litigation under existing fee-shifting statutes and states that the interpretation of the term in the Act should be consistent with the law that has developed under existing statutes. 20/

II. SECTION 2412(b): AWARD OF ATTORNEY FEES AGAINST THE UNITED STATES ON THE SAME BASIS AS A PRIVATE PARTY.

A. The "American rule" and its exceptions.

Under the American rule, the prevailing litigant is ordinarily not entitled to collect attorney fees from the loser. The Supreme Court in Alyeska Pipeline Service Co. v. Wilderness Society, 21/ strictly limited the equitable power of the federal courts to award attorney fees to certain historically recognized situations. Specifically, the Court reaffirmed three equitable bases for such awards: the common fund, the common benefit, and the bad faith rationales.

(footnote continued)
19/ Justice of the Committee on the Judiciary, House of Representatives, May 20 and June 24, 1980, 96th Cong., 2d Sess. at 611-629 (1980).

20/ S. Rep. No. 96-253, 96th Cong., 1st Sess. at 7; H.R. Rep. No. 96-1418, 96th Cong., 2d Sess. at 11.

21/ 421 U.S. 240 (1975).

The common fund rationale is exemplified by the Supreme Court in Trustees v. Greenough, 22/ a suit alleging, inter alia, that the trustees were wasting secured assets. The suit succeeded in bringing the assets within the control of the court. The Supreme Court held that the complainant was entitled to reimbursement for his cost, including his attorney fees, out of the fund itself on the principle of unjust enrichment. In Central R.R. & Banking Com. of Georgia v. Pettus, 23/ the Supreme Court extended the principle, holding in that case that the attorney had an independent claim to reimbursement from the fund.

The common benefit theory extends the rationale of the common fund principle to permit the award of attorney fees in a case where the attorney actually did not create a fund. 24/ In Mills v. Electric Auto-Lite Co., 25/ the Supreme Court awarded attorney fees to the shareholders of Electric Auto-Lite who had brought a stockholder derivative action against the corporation, successfully establishing that its merger with another corporation had been tainted by misleading proxy statements. Although there was no monetary recovery, the Court considered it proper to charge the plaintiffs' attorney fees to the defendant corporation because the corporation was in fact the beneficiary of the lawsuit.

22/ 105 U.S. 527 (1881).

23/ 113 U.S. 116 (1885).

24/ Sprague v. Ticonic National Bank, 307 U.S. 161 (1939).

25/ 396 U.S. 375 (1970).

The final equitable rationale for imposing a fee obligation that survives Alyeska is the bad faith doctrine. The courts may award attorney fees for "'willful disobedience of a court order . . . as part of the fine to be levied on the defendant'" 26/ or "when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons'." 27/

Usually, bad faith is found in a party's dilatory or obstructionist conduct during the litigation itself. 28/ There is authority, however, for awarding fees based upon the bad faith of the party's conduct that gave rise to the litigation. 29/

26/ Alyeska Pipeline Service Co. v. Wilderness Society, supra, 421 U.S. at 258, quoting Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967).

27/ Id. at 258-259, quoting F. D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116, 129 (1974).

28/ See, e.g., Red School House, Inc. v. OEO, 386 F. Supp. 1177, 1193-1194 (Minn. 1974); Gates v. Collier, 371 F. Supp. 1368 (N.D. Miss. 1973), aff'd, 489 F. 2d 298 (5th Cir. 1973), vacated and remanded, 522 F. 2d 81 (5th Cir. 1975); Sims v. Amos, 340 F. Supp. 691 (M.D. Ala. 1972), aff'd, 409 U.S. 942 (1972).

29/ See, e.g., Doe v. Poelker, 515 F. 2d 541, 548 (8th Cir. 1975), rev'd on other grounds, 432 U.S. 519 (1977), rehearing denied, 434 U.S. 880 (1977). See also Hall v. Cole, 412 U.S. 1, 15 (1973); Miller v. Carson, 401 F. Supp. 835, 853-857 (M.D. Fla. 1975), aff'd., 563 F. 2d 741 (5th Cir. 1977); but see Huddleston v. Herman & Maclean, 640 F. 2d 534, 559-560 (5th Cir. 1981).

In the absence of a common fund, a common benefit, or bad faith, it is clear under Alyeska that the federal courts do not have the power to award attorney fees unless the authority has been specifically conferred upon them by a statutory exception to the American rule.

B. The "American rule" and the award of attorney fees against the United States.

Section 2412, 28 U.S.C., specifically addresses the subject of the award of costs and fees against the United States or any agency and any official of the United States acting in his or her official capacity. Prior to its amendment by the Act, Section 2412 expressly proscribed an award of attorney fees against the United States, even under the common law exceptions, in the absence of specific statutory authority. The new Section 2412(b) will make the United States liable for attorney fees to the same extent that any other party would be liable under the common law exceptions to the American rule and under statutes that provide for fee awards (even under statutes that do not specifically authorize awards against the United States).

Section 2412(b) provides as follows:

> (b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency and any official of the United States acting in his or her official capacity in any court

> having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

This subsection "reflects the belief that at a minimum, the United States should be held to the same standard in litigating as private parties and that no justification exists for exempting the United States from fee awards in these limited situations." 30/

C. Fee exposure under Section 2412(b)in Tax Division cases.

The Tax Division will contend that the only courts authorized to make awards under Section 2412(b) are those defined in 28 U.S.C., Sec. 451 such as the district courts, the courts of appeals and the Court of Claims, but not the state courts, the bankruptcy courts, nor the Tax Court. 31/ Attorney fees and expenses incurred by a prevailing party in appealing a decision of the Tax Court may be subject to an award by the court of appeals since a court of appeals is a "court of the United States."

Any exposure to attorney fee awards under Section 2412(b) in cases handled by the Tax Division will emanate from the common law

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30/ S. Rep. No. 96-253, *supra* at 19; see also, H.R. Rep. No. 96-1418, *supra* at 17.

31/ H.R. Rep. No. 96-1418, *supra* at 17.

exceptions to the American rule as they may be applied by these courts. 32/

The bad faith exception may be frequently pleaded since, under the Allen Amendment, 33/ the only previous statutory provision allowing attorney fee awards in tax cases, the standards applied by the courts generally focused on whether the United States' position or behavior was frivolous, harassing, vexatious, unreasonable, or without foundation, or whether an action was instituted in bad faith.

The decisional law interpreting the Allen Amendment essentially uses the Christiansburg Garment Co. v. EEOC, 34/ standard which the Court said did not require a showing

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32/ While Section 2412(b) waives sovereign immunity with respect to statutory attorney fees provisions that previously have been inapplicable to the United States, it is unlikely that any of these statutes apply to the types of cases generally handled by the Tax Division. The text of these statutes is set out in Hearings before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, House of Representatives, May 20 and June 24, 1980, 96th Cong., 2d Sess. at 611-629 (1980).

33/ Section 205(c) of the Act repeals the so-called Allen Amendment to the Civil Rights Attorney's Fees Award Act of 1976 (42 U.S.C. §1988) which permitted the award of a reasonable attorney fee as part of costs to a prevailing party in any civil action or proceeding brought by or on behalf of the Government to enforce a provision of the Internal Revenue Code.

34/ 434 U.S. 412 (1978).

of subjective bad faith. The common law bad faith exception, in contrast, has generally been interpreted to require subjective bad faith. 35/

The factual situation presented in Bryant v. United States 36/, although resolved under the Allen Amendment, is an example of the kind of case where there may be exposure under the bad faith exception. The case involved 100% penalty assessments made against Mrs. Bryant who was employed as a bookkeeper for a contractor which had a long history of making untimely withholding tax payments and a Mr. Borden, who controlled and supervised the company's operations. Bryant had paid $10 of the assessment and sued for a refund. The Government then counterclaimed for the balance owed on the assessment, approximately $80,000. Although the court found that at the time of the assessment the Internal Revenue Service could reasonably have concluded that Bryant was liable under Code Section 6672, the court also found as a fact that the Government's purpose in filing the counterclaim against her was not to collect the assessment but rather was a trial tactic to secure her testimony against Borden. It based its finding upon the sworn testimony of the plaintiff's attorneys, rejecting the testimony of Government counsel which denied the trial tactics charge. The court concluded that the counterclaim was filed for the purpose of "intimidating" Bryant and was, therefore, instituted in bad faith.

35/ See page 11 and cases cited in notes 28 and 29, supra.

36/ 79-2 U.S.T.C., para. 9660 (E.D. Pa. Sept. 9, 1979), aff'd without opinion, C.A. No. 79-2659 (3d Cir. July 9, 1980).

It is anticipated that the common fund and common benefit rationales will be raised in cases in interpleader or in the nature of interpleader. In those cases under prior law, attorney fees and costs were commonly claimed either by the attorney for a stakeholder or by an attorney who "created a fund" from which competing creditors might claim payment.

Except in rare instances, fees have been denied when payment of the fees from the interpleader fund would impair enforcement of a federal tax lien. 37/ The ground for this holding has been that if a court were to permit invasion of the fund for this reason, it would be improperly awarding to the party claiming attorney fees a priority of lien over that of the United States, despite the fact that the claimant's claim was "inchoate" when the federal tax lien attached. The superpriority for an attorney's lien provided by Section 6323(b)(8) of the Code is a statutory exception to this principle.

Most court cases which have confronted the issue of the source of the power of a federal court to award costs and attorney fees out of an interpleader fund have assumed that a federal court is possessed of those powers which characterized the traditional equity court. Other courts, however, have concluded that their power was dependent on whether a court of the forum state could award such fees.

In any event, we expect that both a party whose attorney created a fund and a party who acted as stakeholder and incurred attorney fees for this reason will argue that

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37/ See, *e.g.*, *United States* v. *R. F. Ball Constr. Co.*, 355 U.S. 587 (1958).

they are entitled to reimbursement under the common fund and/or common benefit exceptions to the American rule. 38/

It is the Tax Division's view that Section 2412(b) is a waiver of sovereign immunity which will render the United States liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of a statute. We do not view Section 6323 of the Code as an express prohibition of such an award.

It should be kept in mind, however, that the common benefit and common fund exceptions are equitable exceptions and the award of fees and expenses is discretionary with the court. It will be necessary, therefore, to become thoroughly familiar with arguments used to reduce or deny such awards, for example, the self-interest of the claimant in the outcome of the law suit, in order to successfully defend against attorney fees in this previously well-settled area of the law. A good starting point for research on these issues is either 3A J. Moore's Federal Practice, para. 22.16 (2d ed. 1979), or 7 C. Wright and A. Miller, Federal Practice and Procedure, Section 1719 (1972).

D. Rule 37 of the Federal Rules of Civil Procedure.

Rule 37, "Failure to Make or Cooperate in Discovery: Sanctions," generally provides for the imposition of sanctions against the

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38/ In cases where a party seeks attorney fees and expenses under these exceptions, time spent litigating the issue may not be compensable. Copeland v. Marshall, 641 F. 2d 880, 896, n. 29 (D.C. Cir. 1980).

party or the attorney advising the party's conduct, or both of them, for discovery abuse, unless the court finds that the action taken was "substantially justified or that other circumstances make an award of expenses unjust." 39/ Additionally, Rule 37(c) provides that if a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney fees.

Prior to the effective date of the Act, Rule 37(f) provided that "[e]xcept to the extent permitted by statute, expenses and fees may not be awarded against the United States under this rule." In the spirit of subjecting the United States to fees on the same basis as other parties, Section 205(a) of the Act repeals subdivision (f) of Rule 37. The deletion of this provision "reflects the belief that the United States should be liable for fees the same as private parties when it abuses discovery." 40/

Section 2412(b) is a waiver of sovereign immunity and, as a general proposition, waivers of sovereign immunity are to be strictly construed. Section 2412(b) provides that the United States will be liable for attorney fees "to the same extent that any other party would be liable under the common

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39/ Federal Rules of Civil Procedure, Rule 37(a)(4), (b)(2) and (d).

40/ S. Rep. No. 96-253, supra at 22; see also, H.R. Rep. No. 96-1418, supra at 19.

law or under the terms of any statute which specifically provides for such an award." (Emphasis supplied.) Unless the phrase "common law" or "statute" is interpreted to include a rule of court, Section 2412(b) could be interpreted to exclude sanctions imposed under the Federal Rules of Civil Procedure. That interpretation clearly would be contrary to legislative intent since the Senate Judiciary Committee indicated that in making the United States subject to an award of attorney fees to the same extent as private parties, awards could be recovered against the United States as sanctions under the Federal Rules of Civil Procedure. 41/ The House Judiciary Committee also believed that in eliminating Rule 37(f) of the Federal Rules of Civil Procedure, the United States would thereby become liable for fees and expenses under Rule 37, presumably, because of the provisions of Section 2412(b). 42/

In light of the clear Congressional intent that the United States be potentially liable for fees and expenses under Rule 37 and the probability that it viewed the term "statute" in Rule 2412(b) as including Rule 37 of the Federal Rules of Civil Procedure, as amended, the Tax Division will interpret Section 2412(b) to waive sovereign immunity so that the United States may be held liable for fees and expenses under Rule 37.

E. Payment of Section 2412(b) awards.

The effect of Section 204(c)(2) of the Act is that awards against the United States under Section 2412(b) will generally be paid from the permanent appropriation established

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41/ S. Rep No. 96-253, 96th Cong., 1st Sess. at 4, 19.

42/ H.R. Rep. No. 96-1418, supra at 19.

by Section 1302, Act of July 27, 1956, ch. 748, 70 Stat. 678, 43/ commonly known as the "general judgment fund." If the basis for the award is a finding that the United States acted in bad faith, however, the award must be paid from the operating funds of the agency found to have acted in bad faith. 44/ In cases handled by the Tax Division, bad faith could be found to exist on the part of either the Department of Justice or the Internal Revenue Service so that either agency or both could be liable for the attorney fee and expense award.

III. SECTION 2412(d) PROVISION FOR AWARDS OF FEES AND EXPENSES AGAINST THE UNITED STATES.

A. Civil actions affected.

The Act redesignates Section 2412, the longstanding provision for "costs," as Section 2412(a). The new Section 2412(d) provides, in part, as follows:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort) brought by or against the United States in any court

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43/ 31 U.S.C. Sec. 724a.

44/ As explained in greater detail in Section III, Part Q, *infra*, awards against the United States under Section 2412(d), on the other hand, must be paid from the operating funds of the agency in the first instance.

> having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

The Tax Division takes the position that Section 2412, as amended by the Act, does not apply to the Tax Court, 45/ state courts and bankruptcy courts. In Sharon v. Commissioner, 46/ the Tax Court held that Section 2412, prior to its amendment, permitted recovery of costs only in a "court of the United States," as defined in 28 U.S.C., Section 451, and for that reason had no application to Tax Court cases.

The legislative history of the Act supports the conclusion that this interpretation applies equally to Section 2412, as amended. The report of the House Judiciary Committee says with respect to the courts authorized to make awards under Section 2412(b), the provision relating to the common law and statutory exceptions to the American rule, that-- 47/

> The courts so empowered are those defined in section 451 of title 28, United States Code. This is consistent with the present law in section 2412.

45/ A legal memorandum prepared by the Office of Chief Counsel fully discussing this position is contained in Appendix G, infra.

46/ 66 T.C. 515 (1976), aff'd, 591 F. 2d 1273 (9th Cir. 1978).

47/ H.R. Rep. No. 96-1418, supra at 17.

Section 451 does not list the Tax Court 48/ or state courts or bankruptcy courts as courts of the United States. In fact, in the case of bankruptcy courts, Congress felt it necessary to amend 49/ Section 451 to list them so that they would become courts of the United States on April 1, 1984. 50/

In the case of the Tax Court, the legislative history contains additional support for this contention for the legislation was enacted on the basis of budget estimates which recognized that-- 51/

> As mandated by the bill, tort and Tax Court cases have been excluded.

Moreover, during debate on the Act, Senator Gaylord Nelson, a cosponsor of the Act, expressly addressed the issue, saying-- 52/

48/ The 1948 legislative history of the revision and codification of Judicial Code indicates that as passed by the House of Representatives, the Tax Court was specifically listed as a "court of the United States"; however, all references to the Tax Court were deleted by the Senate in order to avoid any controversy in moving the bill to enactment. S. Rep. No. 1559, 80th Cong., 2d Sess. (1948).

49/ The Act of November 6, 1978, Pub. L. No. 95-598, 92 Stat. 2661, Sec. 213.

50/ Id. at Sec. 402.

51/ S. Rep. No. 96-253, supra, at 10; H.R. Rep. No. 96-1005 pt. 1, supra at 13; H.R. Rep. No. 96-1418, supra at 22.

52/ 126 Cong. Rec. S10992 (daily ed. July 31, 1979).

> While this bill provides for the fees to be paid in tax-related matters being heard in the U.S. district courts, it is not available in cases before the Tax Court.

B. What cases are pending on October 1, 1981.

Section 208 of the Act provides that the amendments to the Act shall take effect on October 1, 1981, and shall apply to any civil action described in 28 U.S.C., Section 2412, which is pending on, or commenced on or after, that date.

The fact that a case may be pending, by itself, will not determine the eligibility of a civil action for an award under Section 2412(d). Section 2412(d)(1)(B) of the Act also requires a party to file an application for an award "within thirty days of final judgment in the action."

In district court cases, the Tax Division interprets the term "final judgment," used in Section 2412(d)(1)(B) as an noninterlocutory judgment entered by a district court. This interpretation is consistent with the meaning given to the term in Rule 54(b) and (c) (relating to judgments), Rule 60(b) (relating to relief from a judgment or order), and Rule 62(a) and (c) (relating to stay of proceedings to enforce a judgment) of the Federal Rules of Civil Procedure. Thus, "final judgment" means the same as "final decision" in 28 U.S.C., Section 1291 (relating to the jurisdiction of courts of appeals), and the 30 days for filing an application for an award begins to run from the entry of final judgment. Thus, if a timely motion for judgment notwithstanding the verdict (Rule 50(b)), or motion to amend or make additional findings (Rule 52(b)), is made, grant or denial of such motion would start the 30-day period running, as would the denial of a motion for a new trial (Rule 59).

The Court of Claims has defined the term "final judgment" as used in Section 2412(d)(1)(B) as "the entry by the court of a final judgment for the payment of money, or for the dismissal of a petition, or of a final order in an appeal under Chapter XV, or of a final judgment as defined in Rule 147(d)." 53/

A judgment entered in a court of appeals under Rule 36 of the Federal Rules of Appellate Procedure, or a final order of the Supreme Court will be considered a "final judgment" for purposes of Section 2412(d)(1)(B).

Where an application is made for the first time on appeal, normally we will seek to have the Court of Appeals make the determination as to substantial justification or the presence of special circumstances. Where a decision of a court of appeals or the Supreme Court results in a remand, an application for an award may be filed within thirty days of the entry of final judgment on remand.

As of this writing, the Department is considering whether it will oppose applications for fees and expenses incurred before October 1, 1981, on the ground that the Act does not contain a waiver of sovereign immunity sufficiently specific to permit such

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53/ Rules of the United States Court of Claims, Rule 148(a) as amended on October 1, 1981. A copy appears in Appendix H, infra.

awards to be made pursuant to Section 2412(b) or (d). 54/

C. Eligible party

To be eligible for an award of attorney fees and other expenses under the Act, an applicant must be a "party" to a civil action. The term "party" is defined in Section 2412(d)(2)(B) as follows:

> '[P]arty' means (i) an individual whose net worth did not exceed $1,000,000 at the time the civil action was filed, (ii) a sole owner of an unincorporated business, or a partnership, corporation, association, or organization whose net worth did not exceed $5,000,000 at the time the civil action was filed, except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of the Code and a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association, or (iii) a sole owner of an unincorporated business, or a partnership, corporation, association, or organization, having not more than 500 employees at the time the civil action was filed* * *.

54/ See Nibali v. United States, 634 F. 2d 494 (Ct. Cl. 1980); Brookfield Construction Co., Inc. v. United States, No. 555-79C (Ct. Cl. September 23, 1981)(a copy of this decision appears in Appendix I, infra).

The agency adjudication segment of the Act also defines party, but uses a different definitional approach. The result is that the definition of "party" under Section 2412(d)(2)(B) could be read more broadly than the definition contained in 5 U.S.C., Section 504(b)(1)(B), to treat any business with 500 or fewer employees, even if its net worth is more than $5 million, as a "party" eligible for fees and expenses.

The effect of the definitions of "party" is to exclude from eligibility for an award certain categories of persons. Both definitions contain three exclusions, a $1 million net worth exclusion, a $5 million net worth exclusion and a 500 employee exclusion. Under the definitions, an individual having a net worth of more than $1 million is not an eligible party; nor is a sole owner of a proprietorship, 55/ a partnership, association, or organization eligible if its net worth exceeds $5 million. Code Section 501(c)(3) organizations and agricultural cooperatives, however, are not subject to a net worth limitation. 56/

55/ We will contend that an individual is subject to the $1 million limitation when suing in a personal capacity and to the $5 million limitation when suing in the capacity of sole proprietor. Both personal and business assets should be taken into account in calculating either net worth limitation.

56/ We will contend that governmental bodies can not be qualifying parties based upon testimony of a Senate sponsor of the legislation indicating that governmental bodies were not intended to be covered by the Act. Hearings before the Subcommittee on Courts, Civil Liberties and the Administration of
(footnote continued)

The potential difference in eligibility standards involves the 500-employee limitation under the two definitions. Under Section 504(b)(1)(B), it is clear that (1) a business having more than a $5 million net worth is not eligible merely because it has no more than 500 employees; and (2) the 500-employee limitation applies to Section 501(c)(3) organization and agricultural cooperatives. One reading of Section 2412(d)(2)(B), however, is that any business or other described organization, is eligible as long as it has no more than 500 employees and a Section 501(c)(3) organization or an agricultural cooperative is eligible regardless of the number of its employees.

The legislative history of the Act states that the definition of "party" in Section 2412(d)(2)(B) is intended to parallel the definition of "party" contained in Section 504(b)(1)(B). 57/ The Committee Reports clearly indicate that the $5 million net worth (or Section 501(c)(3) - agricultural cooperative) and 500-employee tests are interdependent with the result that both

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(footnote continued)
56/ *Justice of the House Committee on the Judiciary*, May 20 and June 24, 1980, 96th Cong., 2d Sess. at 31-32 (1980). In any event, it should be noted that a State or municipality cannot avoid the $5 million net worth limitation by qualifying as a Section 501(c)(3) organization, although an entity separately organized by the State or municipality, such as a college or hospital, can qualify. Rev. Rul. 60-384, 1960-2 C.B. 172; see *Old Colony Trust Company* v. *U.S.*, 438 F. 2d 684 (1st Cir., 1971).

57/ H.R. Rep. No. 96-1418, *supra* at 18; S. Rep. No. 96-253, *supra* at 21.

standards must be satisfied before a sole proprietor or organizational party will be eligible. 58/ The Tax Division, therefore, will contend that Section 2412(d)(2)(B) must be placed in the context of the Act as a whole with the result that the legislative history should be examined to ascertain the true meaning of Section 2412(d)(2)(B). 59/

Accordingly, the Tax Division will interpret Section 2412(b)(2)(B), to treat the following as eligible applicants:

1. an individual with a net worth of not more than $1 million;

2. the sole owner of an unincorporated business who has a net worth of not more than $5 million and not more than 500 employees;

3. a charitable or other tax exempt organization described in Section 501(c)(3) of the Internal Revenue Code (26 U.S.C.) with not more than 500 employees;

4. a cooperative association as defined in Section 15(a) of the Agricultural Marketing Act, ch. 24, 46 Stat. 11 (12 U.S.C. §1141j(a)) with not more than 500 employees and;

5. any other partnership, corporation, association, or organization with a net worth of not more than $5 million and not more than 500 employees.

58/ H.R. Rep. No. 96-1418, supra at 15 (1980); H.R. Conf. Rep. No. 96-1434, 96th Cong., 2d Sess. at 22-23 (1980); S. Rep. No. 96-253, supra at 17 (1979).

59/ See Westinghouse Salaried Employees v. Westinghouse Electric Corp., 348 U.S. 437, 433-444 (1955).

For the purpose of determining eligibility, the net worth and number of employees of an applicant are to be determined as of the date the civil action was initiated.

Trusts and estates are not included within the definition of "party" in Section 2412(d)(2)(B). Accordingly, the Tax Division will oppose any application for an award under Section 2412(d) made on behalf of a trust or an estate on the ground that it is not an eligible party.

Neither the Act, nor its legislative history, offers any assistance in defining who is an employee for purposes of the Act. The Tax Division has determined to apply the common law definition of "employee" in resolving questions which might arise with regard to the status of persons as employees. 60/

The term "net worth" is not defined in the Act but the legislative history offers some help on this point. The Committee Reports state that net worth "is calculated by subtracting total liabilities from total assets. In determining the value of assets, the cost of acquisition rather than fair market value should be used." 61/ We will urge that adjustments for depreciation and capital improvements should not be taken into account.

60/ The withholding tax regulations, Treasury Regulations on Employment Tax (1954 Code), Section 31.3401(c)-1 (26 C.F.R.), reflect the common law definition of employee and a substantial body of case law exists concerning application of the common law definition.

61/ S. Rep. No. 96-253, *supra* at 17; H.R. Rep. No. 96-1418, *supra* at 15.

Factors may exist surrounding the issue of eligibility which arguably could constitute special circumstances making an award unjust even though Section 2412(b)(2)(B), if strictly construed, might not be interpreted to render the party ineligible. For example, a prevailing party may have disposed of assets or incurred obligations solely for the purpose of meeting an eligibility standard or may have more than a $5 million net worth or more than 500 employees if the assets and employees of its affiliates are taken into account. In light of the legislative intent to limit the relief accorded by the Act to small businesses, it may be worthwhile to explore and fully develop the facts surrounding the matters of the prevailing party's net worth and number of employees in order to see whether or not a special circumstances defense is available.

D. What it means to prevail.

Another threshold inquiry, is whether the taxpayer, or other party claiming an award, is a "prevailing party." That term is not defined in the Act. The Committee Reports to S. 265 state Congress intended the term to be consistent with the law that has developed under existing statutes using that term and that decisional law is described in the Reports as follows: 62/

> Thus, the phrase "prevailing party" should not be limited to a victor only after entry of a final judgment following a full trial on the merits. A party may be deemed prevailing if he obtains a favorable settlement of his case, Foster

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62/ H.R. Rep. No. 96-1418, supra at 11; S. Rep. No. 96-253, supra at 7.

v. Boorstin, 561 F. 2d 340 (D.C. Cir. 1977); if the plaintiff has sought a voluntary dismissal of a groundless complaint, Corcoran v. Columbia Broadcasting System, Inc., 121 F. 2d 575, (9th Cir. 1941); or even if he does not ultimately prevail on all issues, Bradley v. School Board of the City of Richmond, 416 U.S. 696 (1974).

In cases that are litigated to conclusion, a party may be deemed "prevailing" for purposes of a fee award in a civil action prior to the losing party having exhausted its final appeal. A fee award may thus be appropriate where the party has prevailed on an interim order which was central to the case, Parker v. Matthews, 411 F. Supp. 1059, 1064 (D. D.C. 1976), or where an interlocutory appeal is "sufficiently significant and discrete to be treated as a separate unit," Van Hoomissen v. Xerox Corp., 503 F. 2d 1131, 1133 (9th Cir. 1974).

The House Small Business Committee expanded: 63/

> [Y]our committee clearly intends that where a small business or individual prevails against the Government either in toto or in substance, reasonable costs and fees shall be paid to him unless the Government can show that its action was substantially justified.

63/ H.R. Rep. No. 96-1005, pt. 1, 96th Cong., 2d Sess. at 8; emphasis supplied.

The Committee further stated: 64/

> The subcommittee believed that in addition to those private parties who prevail on all issues in litigation or by final administrative order, a party also should be eligible for recovery if he obtains a favorable settlement, a voluntary dismissal, or where he may be deemed to have prevailed due to a decision in his favor or prevailed on less than all the issues or *if the amount of the judgment against his [sic] was only a fraction of the amount the Government sought*.

Under existing fee-shifting statutes, the significance and substantiality of the issues or the relief won by the applicant are the factors most frequently looked to by the courts to make the determination. 65/ It is

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64/ *Id*. at 6; emphasis supplied.

65/ See, *e.g.*, *Nadeau* v. *Helgemore*, 581 F. 2d 275, 278 (1st Cir. 1978) (plaintiffs may be considered prevailing parties if they succeed on any significant issue in litigation which achieves some of the benefit sought in bringing the suit); *Dawson* v. *Pastrick*, 600 F. 2d 70 (7th Cir. 1979) (the litigation provided substantial benefits to plaintiffs and to members of the class); *Hanrahan* v. *Hampton*, 446 U.S. 754 (1980) rehearing denied, 448 U.S. 913 (1980) (only when a party has prevailed on the merits of at least some of his claims has there been a determination of the substantial rights of the parties which Congress has determined was a necessary foundation for
(footnote continued)

difficult to draw any hard and fast rules in applying these concepts to tax litigation. The best that can be said is that the determination will be made by the courts on a case-by-case basis. At a minimum the party must prevail in a significant or substantial way relating to the merits of a case in order to qualify for an award under the Act. 66/

The same considerations apply in determining whether a party prevailed by obtaining a favorable settlement. A party may be considered to have prevailed where the United States fully conceded a case if the filing of the lawsuit and the administrative reconsideration were causally related. 67/

The legislative history indicates that interim awards or awards after a successful interlocutory appeal may be appropriate in some instances. Attorney fees relating to an interlocutory appeal are not compensable

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(footnote continued)
65/ departing from the usual rule in this country that each party is to bear the expenses of his own attorney); Perkins v. New Orleans Athletic Club, 429 F. Supp. 661 (E.D. La. 1976) (the plaintiff did not prevail in his primary effort but obtained substantial relief in any event).

66/ The question of whether a party prevails is only one matter at issue with respect to applications for awards. See discussions infra concerning "substantial justification" and "special circumstances" that would make an award unjust.

67/ Foster v. Boorstin, 561 F. 2d 340 (D.C. Cir. 1977); but see Oldham v. Ehrlich, 617 F. 2d 163 (8th Cir. 1980).

unless or until the applicant has prevailed on the merits of the case. 68/

A factor sometimes considered on requests for interim awards is whether the award is necessary to continue litigation which has proven to be meritorious at the time of the application. 69/ In Letelier v. United States Department of Justice 70/, however, the court noted the practical difficulties allowing interim fees would engender and denied them in light of the absence of any clear direction from Congress. The Tax Division will attempt to strictly limit interim awards.

E. What is substantial justification.

Section 2412(d)(1)(A) provides for the award of attorney fees and other expenses "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." The standard is based on the language in Rule 37 of the Federal Rules of Civil Procedure which prohibits the imposition of sanctions under the rule if the party's action "was substantially justified or other circumstances made an award unjust." 71/

68/ Grubbs v. Butz, 548 F. 2d 973 (D.C. Cir. 1976); Hanrahan v. Hampton, supra; but see Van Hoomissen v. Xerox Corp., 503 F. 2d 1131, 1133 (9th Cir. 1974).

69/ See Biberman v. FBI, 496 F. Supp. 263 (S.D. N.Y. 1980).

70/ No. 79-1984 (D.C. Cir. Oct. 2, 1980).

71/ S. Rep. No. 96-253, supra at 20; H.R. Rep. No. 96-1418, supra at 18.

The meaning of the standard as used in Rule 37 is explained by the Advisory Committee of the Judicial Conference of the United States which drafted it as follows: 72/

> On many occasions, to be sure, the dispute over discovery between the parties is genuine, though ultimately resolved one way or the other by the court. In such cases, the losing party is substantially justified in carrying the matter to court. But the rules should deter the abuse implicit in carrying or forcing a discovery dispute to court *when no genuine dispute exists*. And the potential or actual imposition of expenses is virtually the sole formal sanction in the rules to deter a party from pressing to a court hearing frivolous requests for or objections to discovery.

The Committee Reports to S. 265 expand on the meaning of the standard: 73/

> The test of whether or not a Government action is substantially justified is essentially one of reasonableness. Where the Government can show that its case had a reasonable basis both in law and fact, no award will be made.

72/ 48 F.R.D. 54; emphasis supplied.

73/ H.R. Rep. No. 96-1418, *supra* at 10; S. Rep. No. 96-253, *supra* at 6.

The United States has the burden of proving the reasonableness of its actions. 74/ Upon a showing of substantial justification, no award will be made despite the fact that the taxpayer or other party is the prevailing party.

The Committee Reports suggest that-- 75/

> Certain types of case dispositions may indicate that the Government action was not substantially justified. A court should look closely at cases, for example, where there has been a judgment on the pleadings or where there is a directed verdict or where a prior suit on the same claim had been dismissed. Such cases clearly raise the possibility that the Government was unreasonable in pursuing the litigation.
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> The standard, however, should not be read to raise a presumption that the Government position was not substantially justified, simply because it lost the case. Nor, in fact, does the standard require the Government to establish that its decision to litigate was based on a substantial probability of prevailing. Furthermore, the Government should not be held liable where "special circumstances would make an award unjust." This "safety value" helps to insure that the Government is not deterred from

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74/ S. Rep. No. 96-253, supra at 6, 21; H.R. Rep. No. 96-1418, supra at 10-11, 18.

75/ S. Rep. No. 96-253, supra at 6-7; H.R. Rep. No. 96-1418, supra at 11.

> advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts. It also gives the court discretion to deny awards where equitable considerations dictate an award should not be made.

Given the broad range of civil tax proceedings, what is reasonable in "law and fact" will vary depending on the type of proceeding and the circumstances involved. For example, the threshold of what is "reasonable" in a typical jeopardy assessment situation, or where a taxpayer has refused to provide substantiation, may be lower than in other more deliberative proceedings. Moreover, it may be reasonable in law and fact to take inconsistent positions where a potential "whipsaw" situation could prevent the United States from collecting revenue due. 76/

76/ See Better Beverages, Inc. v. United States, 78-2 U.S.T.C., para. 9644 (S.D. Tex. July 17, 1978), where, in a sale of a business, the issue was whether any part of the purchase price was allocable to a convenant not to compete. The Internal Revenue Service took the position with the buyer that it was not and that it could not take an amortization expense. Against the seller, the Internal Revenue Service took the protective position that the profits from the sale were attributable to the covenant and hence should be reported as ordinary income. The court held for the seller who then sought attorney fees under the Allen Amendment. The court denied fees on the ground that the taxpayer was not a defendant as required for a fee award under the Allen Amendment (42 U.S.C. Sec. 1988). The court went on to say that

(footnote continued)

Whether substantial justification exists will depend upon the facts of each case. A test of reasonableness in fact and in law is an objective test. An unreasonable position will not be considered substantially justified on the ground it was taken in good faith. Concomitantly, we will urge that the alleged bad faith of Internal Revenue Service or Tax Division personnel should be irrelevant in determining under Section 2412(d) whether the position of the United States was substantially justified. 77/

Due to the uncertainty of the interpretation to be given the term "prevailing party," the Tax Division must be prepared to prove that each unsuccessful position was substantially justified.

The position taken in the litigation is sometimes not the same position taken by the Internal Revenue Service during audit. This can result from a review of the administrative file, either by the Office of Chief Counsel or by the Tax Division. Since only fees and expenses incurred by the party in the civil action are potentially recoverable, in these circumstances the fact that a prior incorrect position may have been taken during administrative proceedings should be irrelevant and a party's attempt to lay a foundation for the recovery of an award of fees and expenses under Section 2412(d) on this ground should be resisted.

(footnote continued)
76/ assuming a protective inconsistent position to "protect the revenues" did not constitute "vexatious or frivolous conduct by the government".

77/ Where the issue of bad faith is raised under Section 2412(b) different factors come into play.

The "reasonable basis in law and fact" standard raises the question of when it is to be applied. Generally, the first position to be tested is the position taken by the Tax Division in the litigation. 78/ Nevertheless, a position which appeared substantially justified at the commencement of a judicial proceeding may change its color. For example, in certain circumstances, perhaps because of the limitations of the administrative summons procedures, the Internal Revenue Service might authorize the commencement of a suit before all the relevant facts are known. The case may then require formal discovery before the United States' position in the matter can be properly evaluated. If upon receipt of sufficient information it appears unreasonable to continue this suit, an attempt should be made to conclude the litigation expeditiously.

Similarly, taxpayers on occasion have frustrated the Internal Revenue Service's efforts to correct their tax liabilities by refusing to provide records and otherwise being uncooperative. If such a taxpayer then supplies the necessary documentation after commencement of a refund suit with the result that the case is conceded, we should contend that our defense of the litigation, until such time as the substantiation was provided, was not unreasonable. As long as the litigation is concluded within a reasonable time period, an award of fees and expenses should not be made in these circumstances.

Vigorous enforcement of the tax laws will necessarily result in some cases in which

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78/ An exception to this general statement probably exists where the Tax Division concedes a case before taking a position on the record.

taxpayers prevail. The Act's legitimate purpose of stemming unreasonable Government action, however, should not inhibit vigorous and reasonable administration of the tax laws by either the Tax Division or the Internal Revenue Service. While the Act will require constant reevaluation of a case in light of new information gained, the Tax Division should not be prevented from raising and litigating any meritorious issue.

F. Special circumstances which make an award unjust.

Even if the position of the United States in the civil action is found not to be substantially justified, special circumstances may exist which would render an award of fees and expenses unjust. 79/ The Committee Reports to S. 265 describe the "special circumstances" provision as a "safety valve" which-- 80/

> [H]elps to insure that the Government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts. It also gives the Court discretion to deny awards where equitable considerations dictate an award should not be made.

The "special circumstances" provision derives from Rule 37 of the Federal Rules of Civil Procedure, as does the "substantially

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79/ Sec. 2412(d)(1)(A).

80/ S. Rep. No. 96-253, supra at 7; H.R. Rep. No. 96-1418, supra at 11.

justified" standard; but the facts which would render an award of fees and expenses unjust in a sanctions proceeding may not be analogous to the facts arising in award proceedings under Section 2412(d). The same concept has been applied in a variety of other contexts, particularly in civil rights cases.

In a seminal case in the civil rights area, Newman v. Piggie Park Enterprises, Inc., 81/ the Supreme Court held that one who obtains an injunction under Title II of the Civil Rights Act of 1964 82/ "should ordinarily recover an attorney's fee unless special circumstance would render such an award unjust." 83/ The same principle has been held to apply to applications for attorney fee awards under Section 718 of the Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235. 84/

Although the Supreme Court used the same "special circumstances" language in Piggie Park, it is important to remember in evaluating the usefulness of cases arising in the civil rights area that due to the strong inclination of courts to grant fees to successful plaintiffs, 85/ the "special

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81/ 390 U.S. 400 (1968).

82/ Section 204(d) of the Act, 78 Stat. 241 (42 U.S.C. §2000a-3(b)).

83/ Id. at 402.

84/ 20 U.S.C. §1617.

85/ Under the Civil Rights Act of 1964, as articulated in Newman v. Piggie Park Enterprises, Inc., supra, prevailing plaintiffs
(footnote continued)

circumstances" test is usually very strictly applied. A small sampling of cases in which the courts either, in the exercise of discretion, or applying a "special circumstances" test, denied attorney fees may be useful nevertheless.

In Naprstek v. City of Norwich 86/, the court denied an award of fees where it found that plaintiffs' grounds for attacking a rarely enforced curfew statute to be more contrived than real and that plaintiffs had refused early in the lawsuit to negotiate a settlement to bring the offending statute into compliance with Constitutional standards.

In Brown v. Stackler 87/, plaintiff successfully obtained an injunction against an Illinois statute merely by filing suit and moving for extensions of time for proceeding with the case in order to await the outcome of a Supreme Court case on the issue. The District Court denied plaintiff's claim for fees for 800 hours allegedly spent by the attorney on the case. In sustaining the District Court, the Seventh Circuit held: 88/

(footnote continued)
85/ should ordinarily recover their attorney fees. Prevailing defendants, on the other hand, should recover fees only upon a finding that a plaintiff's action was frivolous, unreasonable or without foundation. Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978).

86/ 433 F. Supp. 1369 (N.D. N.Y. 1977).

87/ 612 F. 2d 1057 (7th Cir. 1980).

88/ Id. at 1059.

> [S]uch denial is an entirely appropriate, and hopefully effective, means of encouraging counsel to maintain adequate records and submit reasonable, carefully calculated, and conscientiously measured claims when seeking statutory counsel fees.

The court pointed out that to permit an award under such circumstances would encourage others to submit high fee claims with the expectation that the courts would reduce them to more reasonable amounts. The fee award was denied outright in order to "discourage such greed." 89/

More recently, in Jordan v. United States Department of Justice 90/, involving a claim for fees under the Freedom of Information Act, 91/ the plaintiff's excessive demand for fees was denied again due to the bad faith of the attorney requesting the award. The plaintiff was a third year law student engaged in research for a law review article on criminal justice who obtained the release of documents relating to the exercise of prosecutorial discretion by the United States Attorney's Office. The court, in its discretion, denied the plaintiff's requested fees in their entirety because they were "enormously excessive and unreasonable". 92/ During the course of the fee determination, it was revealed that the plaintiff was seeking

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89/ Ibid.

90/ 89 F.R.D. 537 (D.C. D.C. 1981).

91/ 5 U.S.C., Section 552.

92/ Jordan v. United States Department of Justice, supra, 89 F.R.D at 538.

over $17,000 in fees ranging from hourly rates of $125 for the most senior attorney, $40 for post-graduate fellows, some of whom were not licensed, to $15 for so-called "law clerks" who were actually law students getting litigation experience. The court found the documentation and recordkeeping "abysmal," 93/ commenting that:

> [T]he breakdown as to the time spent on research of specific issues was woefully inadequate and surely would not suffice in a law firm setting.

The $125 fee requested was held to be unprecedented and the plaintiff was unable to provide any examples where such an hourly fee was awarded a FOIA attorney. In denying any fees for the work of law clerks, the court stated that the attorney fees provision was enacted to assure that FOIA litigants were not prevented from enforcing the Act's provisions "not that law schools obtain a windfall in their clinical program". The court concluded-- 94/

> [P]articularly in a time when our nation is seeking to stem wasteful Government spending, an order in this case requiring the Government to pay an excessive sum in attorney's fees would be unseemly. The bad faith demonstrated by plaintiff in his asserted claim demands denial of any award whatsoever.

Application of the "special circumstances" test must be made on a case-by-case

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93/ Id. at 541.

94/ Id. at 542.

basis. A broad range of "special circumstances" warranting the exercise of discretion to deny applications for awards will exist in tax cases as well. For example, the net worth of an affiliate or a transfer of assets to come within a net worth limitation or some other effort to create or take advantage of eligibility "loopholes" may be special circumstances which would preclude an award.

G. Denial for unreasonable delay of final resolution.

A third ground for reduction or denial of an award of attorney fees to a prevailing party is found in Section 2412(d)(1)(C) which provides that--

> The court, in its discretion, may reduce the amount to be awarded pursuant to this subsection, or deny an award, to the extent that the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy.

Unwarranted resistance to formal discovery and groundless motions may, in appropriate circumstances, constitute such conduct.

H. Categories of cases covered by the Act.

An award under Section 2412(d) of the Act may not be made in tort cases. 95/ The

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95/ Sec. 2412(d)(1)(A); S. Rep. No. 96-253, *supra* at 20; H.R. Conf. Rep. No. 96-1434, 96th Cong., 2d Sess. at 25; H.R. Rep. No. 96-1005, pt. 1, 96th Cong., 2d Sess. at 18.

House Committee Report 96/ states that Section 2412(d), while it does not apply to tort cases, does apply to constitutional tort cases. The other committee reports 97/ refer to all tort cases, 98/ or at least makes no distinction. Since the Act itself expressly excludes all tort cases, the Tax Division litigating position is that all tort cases, including those alleging constitutional torts, are excluded from coverage by Section 2412(d)(1)(A).

As explained infra, 99/ state court actions are not subject to the Act. Upon removal of a case from a state court to a federal court, however, the action will become subject to the Act. Thus, the potential availability of an award of fees and expenses may be a factor to consider in deciding whether to remove a case. Undue weight, however, should not be given to potential exposure to an award.

96/ H.R. Rep. No. 96-1418, supra at 18.

97/ S. Rep. No. 96-253, supra at 20; H.R. Conf. Rep. No. 96-1434, supra at 25; H.R. Rep. No. 96-1005, pt. 1, supra at 18.

98/ Under the Federal Tort Claims Act, ch. 753, 60 Stat. 812, 842, the United States may be liable for certain misconduct of law enforcement officials that may be considered violative of the Constitution. See 28 U.S.C., Sec. 2680(h). Bivens actions and actions against Government employees under Section 7217 of the Code are outside the purview of the Act because such suits are brought against Government employees in their personal, rather than their official, capacity.

99/ Section II, Part C; Section III, Part A.

Section 206 of the Act provides that nothing in Section 2412(d) alters, modifies, repeals, invalidates, or supersedes any other provision of federal law which authorizes an award of attorney fees and other expenses to any party other than the United States that prevails in any civil action brought by or against the United States. Section 206 of the Act is a limitation on the civil actions to which Section 2412(d) may be applicable. This interpretation is in accord with the legislative history which states: 100/

> [S]ubsection [2412(d)(1)] applies to all civil actions except those sounding in tort and those already covered by existing fee-shifting statutes.

Accordingly, we will urge that an applicant is not entitled to an award under Section 2412(d) where the case is covered by another fee shifting provision, such as by the Freedom of Information Act attorney fee provision. Such claims are anticipated, however, since even though the Freedom of Information Act has the advantage of no limitation on the hourly rate on attorney fees such as the one established by Section 2412(d)(2)(A), it does not allow for payment of the broad range of expenses described in Section 2412(d)(2)(A).

I. Fees and expenses allowable.

The "fees and other expenses" allowable under Section 2412(d) are those "incurred by that party in any civil action (other than cases sounding in tort) brought by or against

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100/ S. Rep. No. 96-253, *supra* at 20.

the United States in any court having jurisdiction of that action..." 101/ The Tax Division's position is that fees and expenses incurred during the Internal Revenue Service administrative process may not be awarded because they would not have been incurred in a civil action.

Fees and expenses awardable in civil actions include the reasonable expenses of expert witnesses, costs of any study, analysis, engineering report, test, or project found by the court "to be necessary for the preparation of the party's case" and "reasonable" attorney fees. The amount of fees awarded are to be based on "prevailing market rates" for the kind and quality of services furnished, except that expert witnesses are not to be compensated at a rate in excess of the highest rate of compensation for experts paid by the United States. Also, attorney fees are not to be awarded in excess of $75 per hour, unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee. 102/

With regard to the ceiling on attorney fees, the Committee Reports state: 103/

> The ceiling on attorney fees relates only to the compensation of lawyers themselves. It does not include their overhead expenses or other

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101/ Section 2412(d)(1)(A); emphasis supplied.

102/ Sec. 2412(d)(2)(A).

103/ S. Rep. No. 96-253, *supra* at 16-17, 21; H.R. Rep. No. 96-1418, *supra* at 15, 18.

> costs connected with their representation of a particular interest in a proceeding. * * *
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> In general, the Committee intends that, consistent with the above limitations, the computation of attorney fees be based on prevailing market rates without reference to the fee arrangements between the attorney and client. The fact that attorneys may be providing services at salaries or hourly rates below the standard commercial rates which attorneys might normally receive for services rendered is not relevant to the computation of compensation under the Act. In short, the award of fees is to be determined according to general professional standards.

Neither the Act nor the legislative history states whether parties appearing _pro se_ are entitled to an award under Section 2412(d). The genesis of the Act was the belief that the costs of securing vindication of citizens' rights should not preclude resort to the adjudicatory process. _104/_ Since parties appearing _pro se_ do not incur attorney fees, any award of attorney fees would be a windfall to them which would not be in accord with Congressional intent. _105/_

_104/_ S. Rep. No. 96-253, _supra_ at 5; H.R. Rep. No. 96-1418, _supra_ at 9.

_105/_ Under the Freedom of Information Act, the courts have held that _pro se_ litigants are not entitled to recover attorney fees. _Crooker_ v. _United States Department of Justice_, 632 F. 2d 916 (1st Cir., 1980); _Crooker_ v. _United States Department of the Treasury_, 634 F. 2d 48 (2d Cir. 1980); and

(footnote continued)

J. Requirements of the application under Section 2412(d).

An application for fees and expenses pursuant to Section 2412(d) must be filed which "shows" that the party is a prevailing party and is eligible to receive an award. The Act does not specify the precise form of the application. Presumably, the application in a judicial proceeding would be labelled "motion," "petition," or even "application," consistent with practice under existing fee-shifting statutes such as the Freedom of Information Act.

We interpret the statutory requirement that a party "show" it has prevailed to mandate an explanation by the applicant of the specific position of the United States as to which it prevailed.

The statutory directive that the applicant "show" that it is eligible to receive an award likewise requires more than mere conclusory allegations of eligibility. The facts demonstrating the eligibility of a party for attorney fees under the statutory definition of "party," such as the net worth of the party and the number of its employees, usually will not be a matter of record prior to the filing of the application for an award. It would seem that in order to make

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(footnote continued)
105/ Burke v. United States Department of Justice, 559 F. 2d 1182 (10th Cir. 1977). The rule in the District of Columbia Circuit is to the contrary. Cox v. United States Department of Justice, 601 F. 2d 1 (1979). Accordingly, the Tax Division will oppose the payment of attorney fees to *pro se* applicants under Section 2412(d) of the Act.

these facts a part of the record, the application should be accompanied by an affidavit setting out in detail the factual basis for the claimant's eligibility.

The application must also "show" the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party. The itemized statement must state the actual time expended and the rate at which fees and other expenses were computed. 106/ In at least one circuit, the courts have repeatedly called for detailed affidavits justifying the size of the fee claimed. 107/

A claim for an award made in the complaint could not possibly comply with the terms of the statute inasmuch as it could not "show" that the applicant had prevailed, was eligible or "show" the actual time expended.

In contrast to the requirement for a showing as to eligibility, the Act provides that the applicant need merely "allege" that the position of the United States is not substantially justified. The Government must then "show" that its position was substantially justified. 108/

The application must be filed "within thirty days of final judgment in the

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106/ Sec. 2412(d)(1)(B).

107/ Desimone v. Industrial Bio-Test Laboratories, Inc., 83 F.R.D. 615, 622 (S.D.N.Y. 1979).

108/ S. Rep. No. 96-253, *supra* at 7, 14; H.R. Rep. No. 96-1418, *supra* at 10, 14.

action". 109/ The Tax Division interpretation of the term "final judgment" is contained in Section III, Part B, infra. The Committee Reports state that this language should not be construed to require a final judgment on the merits before a court may award fees. 110/ Thus, there appears to be no limit on how soon a party may apply for an award under Section 2412(d) but it will be deemed untimely if filed more than 30 days after final judgment.

On September 21, 1981, the Administrative Office of the United States Courts sent a memorandum to the Chief Judges of the district courts, Court of Claims and courts of appeals suggesting procedures to be followed under the Act. It seems likely that at least some courts will adopt local rules to specify practice and procedure under the Act. The Court of Claims already has adopted some procedural rules relating to applications under the Act. 111/ The best course of action would be to check with the clerks of the courts concerning the existence of any such procedural court rules.

109/ Sec. 2412(d)(1)(B).

110/ H.R. Rep. No. 96-1418, supra at 18; S. Rep. No. 96-253, supra at 21.

111/ United States Court of Claims Rule 148 appears in Appendix H, infra. The rule, inter alia, provides a definition of final judgment as used in Section 2412(d)(1)(B), allows the United States a 30 day response time and requires the application and supporting statements to be under oath.

K. Response to application

The Act does not establish a time within which the United States must respond to an application for an award. Rule 7(b)(1) of the Federal Rules of Civil Procedure provides that "[a]n application to the court for an order shall be by motion." Accordingly, even if the application is not designated as a "motion," it should be treated as one for the purpose of establishing a time limit for response. Where there is no specific local rule establishing time limits under the Act, our response should be governed by the time limits set by local rules for responding to motions.

The Tax Division has agreed with the Office of Chief Counsel that unless there is an obvious need to address a particular issue under the Act when the initial defense or suit letter is prepared, the Office of Chief Counsel will not discuss the attorney fee issue until its views are requested. 112/ The Tax Division generally will request the views of the Office of Chief Counsel as soon after the case has been decided, settled, or conceded as it appears probable to the Tax Division attorney that an application will be filed, or within two days after receiving notice that an application has been filed. The request should be sent to the office handling the case with a copy to the National Office of the Chief Counsel in cases handled by the District Counsel. Counsel will have 20 days within which to respond.

112/ An exception will be made in that the Office of Chief Counsel will address the matter of a fee and expense award in any letter by which it recommends full concession of a case.

In cases where there is a likelihood that an award will be made, every effort should be made to await the recommendation of the Internal Revenue Service before filing a response. No concession of an attorney fee issue should be made without first receiving the views of the Internal Revenue Service.

The response should raise any failure by an applicant to adequately support by affidavit an application. The response also should raise available defenses, such as substantial justification and special circumstances, and when facts necessary to oppose an application are already contained in the record of the case, the response should tie these into the discussion. It will be necessary in some instances, however, to obtain additional facts by discovery, informal or formal, or from the Internal Revenue Service. Where an application is made during a period when the Government is appealing or contemplating whether or not to appeal a loss, it may be appropriate in some cases, such as those requiring substantial discovery or where the likelihood of success on appeal is great, to move for a stay of the award proceedings pending appeal.

L. Discovery

Award proceedings will present factual issues upon which the parties may desire formal discovery: the United States may want discovery on the applicant's eligibility for an award, to verify the amount of fees and expenses being claimed or even to obtain admissions from the applicant which will support a claim of substantial justification or special circumstances; the applicant may attempt to discover the motives and reasons for the position of the United States which is allegedly substantially unjustified.

The Tax Division generally will not undertake and will oppose discovery on any factual issue solely relating to an award under Section 2412(d) until the court has rendered a decision on the merits of the litigation or the case has been conceded or settled while reserving the attorney fee issue. Until that time, the primary requirement for an award, *i.e.*, that the applicant be a "prevailing party," generally will not exist. Premature discovery is wasteful of the parties' time and resources. Accordingly, we should respond to premature interrogatories, requests for production, and other discovery on these issues by making appropriate objections and/or by filing a motion for a protective order pursuant to Rule 26(c) requesting that discovery not be had until after the merits are determined.

In the past, the Tax Division generally has been successful in protecting the opinions, conclusions, and reasoning of Internal Revenue Service personnel from discovery. [113] Although the relevance of the opinions, conclusions, and reasoning of Internal Revenue Service and Department employees to the issues of substantial justification and special circumstances which would make an award unjust must be determined on a case-by-case basis, the effort should continue to protect opinions, conclusions, and reasoning from disclosure.

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[113] See, *e.g.*, *ISI Corp.* v. *United States*, 73-1 U.S.T.C., para. 9251 (N.D. Cal. Dec. 8, 1972), aff'd, 503 F. 2d 558 (9th Cir. 1974); *Weir Foundation* v. *United States*, 362 F. Supp. 928 (S.D. N.Y. 1973), aff'd *per curiam*, 508 F. 2d 894 (2d Cir. 1974); *Simons-Eastern Co.* v. *United States*, 55 F.R.D. 88 (N.D. Ga. 1972).

The test for substantial justification, *i.e.*, "reasonable in law and fact," is an objective test. Thus, reasons why legal positions which proved to be unsuccessful were taken, such as recommendation by the Internal Revenue Service [114] or by a Tax Division supervisor, should generally be irrelevant under Section 2412(d) as well as the good faith of the attorney advancing the position, or even the institutional good faith of the Department.

If the facts known to the Internal Revenue Service becomes a relevant issue, the Tax Division may find it necessary to develop additional facts beyond those contained in the record or the administrative file. For example, the administrative file may contain a copy of a summons for taxpayer records and a mere notation in the history sheets that the records were not produced. While making the summons a part of the record will be helpful, an affidavit from the agent explaining the full circumstances surrounding the failure to produce may buttress the position. The Office of Chief Counsel has instructed its attorneys to assist Tax Division attorneys in locating revenue agents and officers, in marshaling evidence from them, and assisting in the preparation of affidavits for their signatures.

Discovery on the eligibility of a prevailing party for an award under Section 2412(d) may be required, especially if the courts are not strict in requiring the details of a party's net worth to accompany the application. Informal discovery, i.e., asking opposing counsel to supply the information by affidavit, should ordinarily be the first step. If that is not successful, interrogatories, requests for the production of documents and, possibly, depositions should be used.

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[114] An exception may be where the United States fully concedes a case without filing a response in opposition. The position of the Internal Revenue Service which may have caused the law suit may be the proper position to test in such a case.

Verification of net worth statements on a wholesale basis would not be cost beneficial. Thus, detailed sworn or verified net worth statements will be accepted at face value, unless there is reason for suspicion. While the Internal Revenue Service will perform supplemental investigations on net worth when necessary, we will not routinely request them. The Internal Revenue Service, however, should be requested to forward a party's tax return for the year within which suit was instituted in sufficient time to afford the Internal Revenue Service the opportunity to locate and forward it.

M. The hearing.

An award proceeding may present the following issues:

1. Is the applicant a prevailing party?

2. Is the applicant eligible within the meaning of Section 2412(d)(2)(B)?

3. Was the position of the United States substantially justified?

4. Do any special circumstances exist which would render an award unjust?

5. Did the prevailing party unduly and unreasonably protract the final resolution of the matter in controversy?

6. Are the fees and expenses claimed reasonable?

The last of these issues, _i.e._, determining the reasonableness of the fees and expenses claimed will usually be extremely time consuming. Every effort should be made to have the court defer this issue until the other issues establishing entitlement have been resolved.

It has been held under other fee-shifting statutes that the appropriateness of an award may properly be decided on motion for summary judgment. 115/ The Supreme Court indicated that, in the context of fee awards under Section 4 of the Clayton Act, 38 Stat. 730, 116/ an evidentiary hearing is appropriate. 117/ A number of lower courts require an evidentiary hearing whenever facts pertaining to a fee award are in dispute. 118/ When a court decided a fee question revolving around the calculation of the award after witnessing the conduct of the entire case and with substantial briefs from the parties, however, the failure to hold a hearing was held to be not in error, especially when the

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115/ _Imprisoned Citizens Union_ v. _Shapp_, 473 F. Supp. 1017, 1021 (E.D. Pa. 1979).

116/ 15 U.S.C. Sec. 15.

117/ _Perkins_ v. _Standard Oil Co._, 399 U.S. 222, 223 (1970) (_per curiam_).

118/ See, _e.g._, _National Treasury Employees Union_ v. _Nixon_, 521 F. 2d 317, 322 n.18 (D.C. Cir. 1975). _Thomas_ v. _Honeybrook Mines, Inc._, 428 F. 2d 981, 988-989 (3d Cir. 1970), cert. denied, 401 U.S. 911 (1971); _Campbell_ v. _Spectrum Automation Co._, 601 F. 2d 246, 252 (6th Cir. 1979).

complaining party did not request a hearing. 119/ A district court reduction of claimed fees was held not to be an abuse of discretion, even though no hearing was held, in light of the depth of the briefing. 120/

The legislative history squarely places on the United States the burden of proving that its position was substantially justified, noting that this allocation of burden reflects a general tendency to place the burden of proof on the party who has readier access to and knowledge of the facts in question. 121/ Although the Committee Reports are silent, presumably the United States, as the party to whom the defenses of "special circumstances" or "undue delay" are available, must bear the burden of proof on these issues. On the other hand, the applicant presumably must prove eligibility and that the applicant has prevailed.

N. Calculation of the award.

Once it is determined that an applicant is entitled to an award, it becomes necessary to calculate the amount of the fees and expenses incurred. 122/

119/ Copeland v. Marshall, 641 F. 2d 880, 905 (D.C. Cir. 1980).

120/ Konczak v. Tyrrell, 603 F. 2d 13, 19 (7th Cir. 1979), cert. denied, 444 U.S. 1016 (1980).

121/ S. Rep. No. 96-253 supra at 6; H.R. Rep. No. 96-1418, supra at 10-11.

122/ Under Section 2412(b) a court "may award reasonable fees and expenses of attorneys." The award is discretionary and the Act does not describe the fees and expenses allowable.

Under Section 2412(d)(2)(A), fees and expenses allowable include the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case and reasonable attorney fees. 123/ The amount of fees awarded will be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness will be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees will not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.

In cases handled by the Tax Division, the potential for an award of fees and expenses exists only for work performed in judicial proceedings. Fees and expenses incurred in the Internal Revenue Service administrative process are not recoverable. Since fees and expenses of Internal Revenue Service administrative proceedings are not compensable under the Act, we will contend that the cost of a study, analysis, or expert's

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123/ H.R. 6429, 96th Cong., 2d Sess. (1980), as reported by the House Committee on Small Business would have permitted the award to include "the cost of the party's personal absence from business at an hourly rate." H.R. Rep. No. 96-1005, pt. 1, 96th Cong., 2d Sess., at 11, 17, 24. The fact that this was deleted from the final revision of the Act indicates Congressional intent that awards under the Act should not include the cost of a party's personal absence from business.

report which was presented during the administrative proceeding and again during the trial should not be compensable.

There is a substantial body of law under other fee-shifting statutes on the calculation of attorney fees. Any fee-setting inquiry, must produce an award which is in accord with the primary purpose of the statute. 124/ For example, under Title II of the Civil Rights Act of 1964, the purpose of awarding fees is "to encourage individuals injured by * * * discrimination to seek judicial relief." 125/ The purpose for awarding fees under the Act, on the other hand, is "to diminish the deterrent effect" on private parties of seeking review of or defending against certain governmental action "because of the expense involved." 126/

It is an important obligation of Government counsel to protect the Government against excessive fee awards. The proper method for computing the amount of attorney fee awards is a recent and developing area of the law in which the courts are still searching for appropriate standards. 127/ The standards will ultimately depend upon the decisional law applicable to the case, *i.e.*, the authority of the circuit.

124/ *Copeland* v. *Marshall*, 641 F. 2d 880 (D.C. Cir. 1980).

125/ *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968).

126/ Section 202 of the Act.

127/ *Copeland* v. *Marshall*, *supra* at 909 (dissenting opinion).

Many courts have relied upon the Fifth Circuit opinion, Johnson v. Georgia Highway Express, Inc. 128/, where the court suggested 12 factors which should be considered by district courts for computing the amount of the fee in a Title VII case. These standards were drawn from guidelines recommended by the American Bar Association's Code of Professional Responsibility, Ethical Consideration 2-18 and Disciplinary Rule 2-106. The 12 factors are as follows: 129/ (1) the time and labor required; (2) the novelty and difficulty of the question; (3) the skill requisite to perform the legal services properly; (4) the preclusion of other employment; (5) the customary fee in the community for similar work; (6) the fixed or contingent nature of the fee; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorney; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Although the Johnson factors are noteworthy, they are difficult to apply, largely because they are imprecise and overlap considerably. 130/ The en banc opinion of the District of Columbia Circuit in the Copeland case is helpful in analyzing the relationships among the factors and applying them to a factual setting although the authority of the circuit in which the case is pending must be examined to avoid taking a position which

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128/ 488 F. 2d 714 (5th Cir. 1974).

129/ Id. at 717-719.

130/ Copeland v. Marshall, supra at 890.

has been rejected by that circuit or constitutes an unnecessary concession.

Copeland adopts the view taken earlier by the Third Circuit in Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp. 131/, that an attorney fee calculation begins with a court determining the "lodestar," that is, the number of "hours reasonably expended" multiplied by a "reasonable hourly rate." Adjustments to this figure are appropriate, but the lodestar provides "'the only reasonably objective' starting point for awarding a fee." 132/ The following discussion seeks to adapt the Copeland approach to the Act.

1. Hours reasonably expended.

An attorney should only be compensated for productive time which would ordinarily be properly billed to an attorney's client in the exercise of billing judgment. Under Copeland, a party seeking an attorney fee must document the number of hours of work performed. The Act, itself, requires an "itemized statement" from any attorney representing or appearing for a party stating the actual time expended and the rate at which fees were computed. 133/

There is no requirement in the Act that the itemized statement be sworn to or verified under penalty of perjury. It is anticipated, however, that many applications for awards will be accompanied by the itemized statements of any attorneys and expert witness

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131/ 487 F. 2d 161 (3d Cir. 1973).

132/ Copeland v. Marshall, supra at 891.

133/ Sec. 2412(d)(1)(B).

in affidavit form. In addition, some local rules may require that the itemized statement be sworn to or verified. 134/ In cases where an itemized statement is not in affidavit form the attorney should be requested to follow it up with a proper affidavit. 135/

The affidavit should break down the number of hours per date expended by each attorney and the specific task performed during that time period. The breakdown should include all of the actual hours of work performed, whether or not the attorney seeks compensation for those hours.

Attorney work sheets, time logs, and other timekeeping records may substitute for an affidavit or provide verification where necessary. If there is any reason to disbelieve an attorney's breakdown affidavit, or if the affidavit is not sufficiently detailed, such underlying documentation should be requested. For example, it will be necessary to see the underlying documentation if an attorney has questionable hours billed (such as a large number of hours billed for a brief that very closely resembles one previously filed, or billing of a large number of hours for a relatively short uncomplicated hearing), or has some inadequately described work. If any of these concerns cannot be explained satisfactorily a deposition may be required and/or the court may be requested to schedule a hearing on the number of hours expended.

134/ See, *e.g.*, Rule 148(a) of the Rules of the United States Court of Claims, Appendix H, *infra*.

135/ The same rules should apply to the itemized statement of an expert witness.

No compensation is due for nonproductive time. For example, where three attorneys are present at a hearing when one would suffice, compensation should be denied for the excess time. Moreover, all attorney hours must be reviewed to evaluate the reasonableness of the hours expended on particular projects. For instance, an expert tax attorney should not bill for the large blocks of research time on tax law to oppose a motion for summary judgment which a nonexpert attorney would. Where attorneys bill in units of time, an appropriate number of the units should be deducted if none of the attorney's units do not go below the minimum unit, regardless of the task.

Attorneys should not be compensated for litigating claims upon which they did not prevail. 136/ If the taxpayer prevails on a net operating loss claim and an investment credit claim but not on a travel and entertainment expense claim, hours that are spent on the travel and entertainment expense claim are not compensable.

The reason we, and the courts, need to know the actual number of hours expended in the detail set forth is so that we, and again the courts, can determine the reasonable number of hours expended. Billing judgment must be exercised by a party's counsel. Hours that an attorney ordinarily would not bill to a client that the attorney wanted to remain a client after receiving the bill should not be billed to the Government. If an attorney has exercised billing judgment, the attorney probably will not be seeking payment for every hour expended on a suit.

136/ Nadeau v. Helgemoe, 581 F. 2d 275 (1st Cir. 1978); Dillon v. AFBIC Devel. Corp., 597 F. 2d 556 (5th Cir. 1979).

It will be necessary to calculate the total reasonable number of hours by each attorney for each type of work performed. The example used in Copeland was a table by level of experience of counsel, number of hours, and types of work such as court appearances, review of pleadings, research and drafting, and depositions.

While the Tax Division does not expect the courts to go over each attorney's affidavit or time sheets with a fine-toothed comb to determine whether all of the hours are reasonable, trial attorneys are expected to go over each attorney's hours to determine whether the attorney is exercising the billing judgment that Copeland says the Government has a right to expect.

2. Reasonable hourly rate

The hourly rate at which an attorney may be compensated is limited by the Act to $75 per hour "unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee." 137/

The Act defines "reasonable hourly rate" as the "prevailing market rates for the kind and quality of the services furnished." 138/ This definition is almost identical to that adopted by the Copeland court. 139/ A reasonable hourly rate is the product of a multiplicity of factors: the level of skill

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137/ Section 2412(d)(2)(A)(ii).

138/ Sec. 2412(d)(2)(A).

139/ Copeland v. Marshall, supra, 641 F. 2d at 892.

necessary, time limitations, the amount to be obtained in the litigation, the attorney's reputation and the undesirability of the case. 140/ There may be more than one reasonable hourly rate for each of the attorneys and for each of the kinds of work involved in the litigation.

The truest test of the market rate for an attorney would, by definition, have to be that rate determined in the market or that amount that the attorney could get clients to pay out of their own pockets for work done by the attorney. Thus, the Tax Division will assert that a plaintiff claiming entitlement to a particular hourly rate must demonstrate that the majority of the attorney's paying clients in the market pay that attorney at that rate. A billing rate that is not paid by a client does not reflect the market rate.

It may not be possible for some attorneys to establish their own market rate because they take most, if not all, of their cases on a contingent, or partially contingent, basis. Attorneys in this position should be required to come forward with affidavits from other attorneys of similar skill and experience in the community showing the fees charged by and paid to them.

3. Adjustments to the lodestar.

The lodestar may be adjusted upward or downward by various factors. The burden is on the party proposing the deviation to justify it.

An adjustment to the lodestar may be appropriate to compensate for the risk that the lawsuit may be unsuccessful and that no fee

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140/ Ibid.

may be awarded. The contingency adjustment is a percentage increase of the lodestar; not a percentage of the amount of the recovery. No contingency adjustment is appropriate where the hourly rate includes an allowance for the contingent nature of fees actions. Thus, if a party seeks a contingency adjustment to the lodestar, we should inquire, or request the court to inquire, into the elements of calculation of the attorney's hourly rate. If the hourly rate is at its level, in part, to compensate the attorney for the cases the attorney loses and does not receive a fee, then no contingency adjustment is appropriate.

A long delay in payment adjustment also may be incorporated into a contingency adjustment to allow for the fact that a market rate usually reflects clients who pay their bills promptly. If the attorney uses the present hourly market rate of fees for work which was done long in the past when there was a lower rate or if the client paid the attorney all of the fee as the suit progressed, no adjustment would be proper. It follows that any attorney seeking this adjustment must be prepared to demonstrate that the attorney was not paid in the past and what the attorney's past hourly rates were.

The lodestar may be adjusted for the quality of representation only where it was unusually good or bad, taking into account the level of skill expected of an attorney charging the hourly rate used to compute the lodestar. The lodestar generally compensates attorneys adequately for their time. An adjustment should not be based upon the award given the client but upon the relationship of the award to what was to be expected. An upward adjustment would only be appropriate for exceptional results or performance. The Tax Division will not seek an adjustment on the ground that an attorney's quality of representation was unusually poor without the prior authorization of the appropriate Section Chief.

Under other attorney fee statutes, most courts which have considered the question have recognized the right to recover attorney fees for the time spent litigating the fee issue itself. 141/

A final point to remember is that the Act states that the fee is payable to the prevailing party, and not the attorney. 142/

O. Considerations in conducting settlement negotiations.

The issue of fees and expenses is one which may be the subject of an offer in compromise, either as part of a settlement of the merits of a case, or by itself when raised after final judgment.

The legislative history for the Act indicates that a party may be deemed prevailing if the party obtains a favorable settlement of the case. 143/ Tax Division attorneys are encouraged to obtain a waiver of the award issue in any settlement of the merits. It is the Tax Division's position that normally a compromise should not be effected without a resolution of the fee and expense issue: a contrary approach would mean that the

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141/ L. Berger, *Court Awarded Attorneys' Fees, What is "Reasonable"?*, 126 U. Pa. L. Rev. 281, 320 n.159 (1977).

142/ See, *Hamilton* v. *Ford Motor Company*, 636 F.2d 745, (D.C. Cir. 1980).

143/ H.R. Rep. No. 96-1418, *supra* at 11.

same issue or issues theoretically compromised might have to be substantially litigated in order to determine whether attorney fees were due.

In a school desegregation class action, the Ninth Circuit questioned the ethical propriety of simultaneous negotiation of attorney fees and substantive issues in class action settlement discussions although it upheld the lower court's approval of the settlement involved nonetheless. 144/ The First Circuit, however, in White v. New Hampshire Department of Employment Security, 145/ stated that it saw nothing wrong in a class action consent decree context with "requiring the parties to face up to the issue of fees in their settlement negotiations."

Insofar as an attorney fee claim may be waived, the Ninth Circuit's concern that an attorney's eagerness for a fee award would cause a conflict with the client's interest would be clearly unjustified. Moreover, the concerns expressed in class actions such as Mendoza and Prandini I, are not apposite to the tax cases normally handled by the Tax Division.

In hearings on H.R. 5103 and H.R. 6429, Congressman Smith, a proponent of the Act,

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144/ Mendoza v. United States, 623 F. 2d 1338, 1352-1353 (9th Cir. 1980) cert. denied, 101 S. Ct. 1351 (1981); see also, Prandini v. National Tea Co., 557 F. 2d 1015 (3d Cir. 1977); but compare, Prandini v. National Tea Co., 585 F. 2d 47 (3d Cir. 1978) (another class action case).

145/ 629 F. 2d 697, 705 (1980), cert. granted, 101 S. Ct. 1692 (May 18, 1981).

stated that an advantage to attorneys of making it clear in fee legislation that fees could be awarded for settlements, is that attorneys could then include the matter of attorney fees in their settlement negotiations. 146/ Accordingly, the Tax Division will continue to combine settlement discussions of fee awards with discussions on the merits in its effort to obtain reasonable compromises which will save both the parties and the courts the time and expense of further litigation.

In cases where a waiver of attorney fees cannot be obtained, the fees and expenses to be conceded as part of an offer in compromise will be part of the amount conceded for the purpose of applying Tax Division Directive No. 40. 147/ Thus, for example, subject to certain conditions and limitations stated therein, the Chiefs of the Civil Trial Sections and Court of Claims Section are authorized to accept offers in compromise in all cases in which the amount of the Government's concession, including attorney fees and expenses to be paid, exclusive of statutory interest, does not exceed $50,000, provided that acceptance is not opposed by the Internal Revenue Service or any other agency involved. The Chief of the Appellate Section has similar, although more limited, authority.

146/ Hearings before the Subcommittee on SBA and SBIC Authority and General Small Business Problems of the Committee on Small Business, House of Representatives, April 17, 23, and May 1, 1980, 96th Cong., 2d Sess. at 117.

147/ Redelegation of Authority to Compromise and Close Civil Claims, 45 Fed. Reg. 81201 (December 10, 1980).

The Internal Revenue Service will continue its present system of classifying some cases under the Settlement Option Procedures (SOP). An attorney fee issue under the Act will not be subject to the Settlement Option Procedures, however. Thus, the Tax Division will seek the recommendation of the Internal Revenue Service on any offer in compromise which, if accepted, would require the payment of fees and expenses under the Act. 148/

In light of the Act, the Tax Division has changed its practice of terminating full concession refund cases by a stipulation for dismissal with prejudice to, instead, permitting a judgment to be entered against the United States by means of a stipulation for entry of judgment. Leaving the award issue open in full concession cases is appropriate since ordinarily a decision to fully concede a case will not be affected by whether fees and expenses may be awarded. A stipulation for entry of judgment may be filed upon receipt from taxpayer's counsel; whereas it has been the practice to await receipt of the refund check before filing a stipulation for dismissal. Concession by judgment, therefore, should bring the attorney fee issue out in the open while the case is still fresh since the Act provides that a party seeking an award of fees and other expenses must submit an application to the court within 30 days of final judgment in the action. 149/

148/ In full concession cases, ordinarily the Internal Revenue Service will provide us with their views concerning the allowability of attorney fees at the same time they recommend the concession of a case.

149/ Sec. 2412(d)(1)(B).

It is important to remember that while a full concession may establish that the taxpayer is the prevailing party, it does not establish that the taxpayer is an eligible party or that the United States' position was not substantially justified.

P. Relation to and effect on other fee award statutes.

Section 206 of the Act renders Section 2412(d) inapplicable to all proceedings, such as FOIA and Privacy Act proceedings, covered by any other provision of federal law which authorizes an award of fees and other expenses against the United States.

Q. Payment of Section 2412(d) awards.

Judgments in tax cases are paid out of a special appropriation for that purpose by the Commissioner of Internal Revenue. On the other hand, costs pursuant to Section 2412, now the new Section 2412(a), are paid by the Comptroller General from the general judgment fund established by Section 1302, Supplemental Appropriation Act, 1957 Ch. 748, 70 Stat. 678. 150/

Under the Act, an award under Section 2412(b) will be paid from the general judgment fund unless the basis for the award is a finding that the United States acted in bad faith, then the award shall be paid by the agency itself. 151/

An award under Section 2412(d) will be payable "by any agency over which the party prevails." The question of whether the Justice

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150/ 31 U.S.C. Sec. 724a.

151/ Sec. 2412(b)(2).

Department or the Internal Revenue Service will satisfy awards in cases for which the Tax Division is responsible probably will be resolved by the Office of Management and Budget. The Commissioner has determined that any awards which must be paid from Internal Revenue Service funds will be charged to the office and activity which gave rise to the award.

It is also anticipated that OMB will prescribe payment procedures for awards, resolving whether or not all award payments must be processed by the Office of the Comptroller General.

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Public Law 96-481
96th Congress

An Act

To amend the Small Business Act, to provide for the payment of the United States of certain fees and costs incurred by prevailing parties in Federal agency adjudications and in civil actions in courts of the United States, and for other purposes.

Oct. 21, 1980
[H.R. 5612]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Small business programs and Federal litigation assistance.

PART A.—SMALL BUSINESS ADMINISTRATION MINORITY BUSINESS DEVELOPMENT PROGRAM AMENDMENTS

15 USC 637.

SEC. 101. Section 8(a) of the Small Business Act is amended by striking "September 30, 1980" wherever it appears and by substituting in lieu thereof "September 30, 1981".

15 USC 637 note.

SEC. 102. Section 202(b) of the Act entitled "An Act to amend the Small Business Act and the Small Business Investment Act of 1958" approved October 24, 1978 (15 U.S.C. 631) is amended by—

(a) redesignating subsection (b) as subsection (b)(1);

(b) striking "June 30, 1980" and inserting in lieu thereof "January 31, 1981"; and

(c) adding at the end thereof a new paragraph as follows:

Quarterly reports to congressional committees.

"(2) The Small Business Administration and the agency designated pursuant to section 8(a)(1)(B) of the Small Business Act shall submit separate quarterly reports to the Senate Select Committee on Small Business and the Committee on Small Business of the House of Representatives. Such reports shall contain a review and evaluation of all activities conducted pursuant to section 8(a)(1)(B) of the Small Business Act during the previous three-month period including—

"(A) the number, dollar value, and description of all contracts awarded or being reserved for award pursuant to such section;

"(B) the status of all contracts awarded, including percent of completion and a description of problems incurred in the performance of such contracts;

"(C) the impact, if any, on small business concerns resulting from selection of any contract for award under such section; and

"(D) efforts made by the Administration to identify, match, and negotiate procurement requirements pursuant to such section.

The first such report shall be submitted commencing on January 2, 1981, for the preceding three-month period, and shall continue quarterly through, and include, the quarter ending September 30, 1981. The reports shall not be reviewed by any other agency or office prior to their submission.".

15 USC 633.

SEC. 103. Section 4(b) of the Small Business Act is amended by striking all after the phrase "Capital Ownership Development" through the period and inserting in lieu thereof "and shall be responsible to the Administrator for the formulation and execution of the policies and programs under sections 7(j) and 8(a) of this Act which provide assistance to minority small business concerns.".

15 USC 636, 637.

15 USC 636.

SEC. 104. The second sentence of section 7(j)(10) of the Small Business Act is amended to read as follows: "The program, and all other services and activities authorized under section 7(j) and 8(a) of this Act, shall be managed by the Associate Administrator for Minority Small Business and Capital Ownership Development under the supervision of, and responsible to, the Administrator.".

Prejudice or bias determination.
15 USC 637.

SEC. 105. Section 8(a)(8) of the Small Business Act is amended to read as follows:

"(8) All determinations made pursuant to paragraph (5) with respect to whether a group has been subjected to prejudice or bias shall be made by the Administrator after consultation with the Associate Administrator for Minority Small Business and Capital Ownership Development. All other determinations made pursuant to paragraphs (4), (5), (6), and (7) shall be made by the Associate Administrator for Minority Small Business and Capital Ownership Development under the supervision of, and responsible to, the Administrator.".

15 USC 636.

SEC. 106. (a) Section 7(j)(10)(A)(i) of the Small Business Act is amended by striking the semicolon at the end thereof and inserting in lieu thereof "for correcting the impairment of such concern's ability to compete, as determined for such concern pursuant to section 8(a)(6) of this Act, within a fixed period of time as mutually agreed upon by the applicant and the Administrator prior to acceptance in such program: *Provided,* That not less than one year prior to the expiration of such period, and upon the request of such concern, the Administration shall review such period and may extend such period as necessary and appropriate: *Provided further,* That no determination made under this paragraph shall be considered a denial of total participation for the purposes of section 8(a)(9) of this Act;".

Business plan, submittal.
15 USC 636 note.

(b) Notwithstanding the provisions of subsection (a) of this section, for concerns eligible to receive contracts pursuant to section 8(a) of the Small Business Act on the effective date of the amendment made by this section, each such concern shall submit to the Small Business Administration within two months after the promulgation of final regulations issued within one hundred and twenty days after the enactment of this Act the business plan required under section 7(j)(10)(A)(i) of the Small Business Act, as amended by subsection (a) of this section: *Provided however,* That the period of time required under section 7(j)(10)(A)(i) of the Small Business Act, as amended by subsection (a) of this section, shall be fixed as mutually agreed upon by the program participant and the Small Business Administration prior to the awarding or extending of contracts to such concern pursuant to section 8(a) of the Small Business Act after June 1, 1981, but the period shall be fixed in no case later than eighteen months after the effective date of this Act: *Provided further,* That no determination made under this paragraph shall be considered a denial of total participation for the purposes of section 8(a)(9) of the Small Business Act.

Small business concern contracts.
15 USC 636.
15 USC 637.

SEC. 107. Section 7(j)(10)(C) of the Small Business Act is amended to read as follows:

"(C) No small business concern shall receive a contract pursuant to section 8(a) of this Act unless—

"(i) the business plan required pursuant to section 7(j)(10)(A)(i) is approved by the Administration; and

"(ii) the program is able to provide such concern with, but not limited to, such management, technical and financial services as may be necessary to achieve the targets, objectives, and goals of such business.".

SEC. 108. The second sentence of section 3(a) of the Small Business Act is amended by striking "business." and inserting in lieu thereof "business: *Provided*, That the Administration shall not promulgate, amend, or rescind any rule regulation with respect to size standards prior to March 31, 1981.".

15 USC 632.

PART B—SMALL BUSINESS EXPORT FINANCING

Small Business Export Expansion Act of 1980.
15 USC 631 note.
15 USC 649 note.

SEC. 110. This part may be cited as the "Small Business Export Expansion Act of 1980".

SEC. 111. (a) The Congress finds and declares that—

(1) a strong export policy is essential to the health and well-being of the United States economy;

(2) exports of goods and services account for one out of every six jobs in the manufacturing sector and 10 per centum of the gross national product.

(3) every billion dollars in new exports is estimated to provide forty thousand jobs;

(4) there is increased and fierce competition in international markets to United States goods and services;

(5) small businesses account for no more than 10 per centum of all United States export sales;

(6) Federal Government programs are not sufficently responsive to the needs of small business for export education and development of overseas marketing opportunities necessary to insure that small businesses realize their potential; and

(7) it is in the national interest to systematically and consistently promote and encourage small business participation in international markets.

(b) It is therefore the purpose of this part to encourage and promote small business exporting by—

(1) providing educational and marketing assistance to small businesses;

(2) insuring better access to export information and assistance for small businesses by upgrading and expanding the export development programs and services of the Department of Commerce and the Small Business Administration; and

(3) promoting the competitive viability of such firms in export trade and encouraging increased tourism in the United States by creating a program to provide limited financial, technical, and management assistance as may be necessary.

SEC. 112. Section 7(a) of the Small Business Act is amended by inserting before the phrase "The foregoing powers shall be subject, however," the following new sentences: "The Administration is further empowered, only to such extent and in such amounts as are provided in appropriation Acts, to make or effect either directly or in cooperation with banks or other lending institutions through agreements to participate on an immediate or deferred basis extensions and revolving lines of credit for export purposes to enable small business concerns to develop foreign markets and for preexport financing: *Provided, however,* That no such extension or revolving line of credit may be made for a period or periods exceeding eighteen months. A bank or participating lending institution may establish the rate of interest on extensions and revolving lines of credit as may be legal and reasonable."

Extensions and revolving lines of credit.
15 USC 636.

SEC. 113. The Small Business Act is amended by adding after section 21 the following new section.

Office of International Trade, establishment. 15 USC 649.

"SEC. 22. (a) There is established within the Administration an Office of International Trade which shall implement the programs pursuant to this section.

"(b) The Office shall promote sales opportunities for small business goods and services abroad. To accomplish this objective the office shall—

Export information.

"(1) provide small businesses with access to current and complete export information by—

"(A) making available, at the Adminstration's regional offices through cooperation with the Department of Commerce, export information, including, but not limited to, the worldwide information and trade system and world trade data reports;

"(B) maintaining a current list of financial institutions that finance export operations;

"(C) maintaining a current directory of all Federal, regional, State and private sector programs that provide export information and assistance to small businesses; and

"(D) preparing and publishing such reports as it determines to be necessary concerning market conditions, sources of financing, export promotion programs, and other information pertaining to the needs of small business exporting firms so as to insure that the maximum information is made available to small businesses in a readily usable form;

Trade fairs, shows, and missions.

"(2) encourage through cooperation with the Department of Commerce, greater small business participation in trade fairs, shows, missions, and other domestic and overseas export development activities of the Department of Commerce; and

Export development specialists.

"(3) facilitate decentralized delivery of export information and assistance to small businesses by assigning full-time export development specialists to each Administration regional office and assigning primary responsibility for export development to one person in each district office. Such specialists shall—

"(A) assist small businesses in obtaining export information and assistance from other Federal departments and agencies;

"(B) maintain a current directory of all programs which provide export information and assistance to small businesses within the region;

"(C) encourage financial institutions to develop and expand programs for export financing;

"(D) provide advice to Administration personnel involved in granting loans, loan guarantees, and extensions and revolving lines of credit, and providing other forms of assistance to small businesses engaged in exports; and

"(E) within one hundred and eighty days of their appointment, participate in training programs designed by the Administrator, in conjunction with the Department of Commerce and other Federal departments and agencies, to study export programs and to examine small businesses' needs for export information and assistance.".

Effective date. 15 USC 649 note.

(b) The amendment made by subsection (a) shall take effect on October 1, 1980, or the date of enactment of this Act, whichever occurs later.

TITLE II—EQUAL ACCESS TO JUSTICE ACT

Equal Access to Justice Act.

SEC. 201. This title may be cited as the "Equal Access to Justice Act".

5 USC 504 note.

FINDINGS AND PURPOSE

5 USC 504 note.

SEC. 202. (a) The Congress finds that certain individuals, partnerships, corporations, and labor and other organizations may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights in civil actions and in administrative proceedings.

(b) The Congress further finds that because of the greater resources and expertise of the United States the standard for an award of fees against the United States should be different from the standard governing an award against a private litigant, in certain situations.

(c) It is the purpose of this title—

(1) to diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in specified situations an award of attorney fees, expert witness fees, and other costs against the United States; and

(2) to insure the applicability in actions by or against the United States of the common law and statutory exceptions to the "American rule" respecting the award of attorney fees.

AWARD OF FEES AND OTHER EXPENSES IN CERTAIN AGENCY ACTIONS

SEC. 203. (a)(1) Subchapter I of chapter 5 of title 5, United States Code, is amended by adding at the end thereof the following new section:

"§ 504. Costs and fees of parties

5 USC 504.

"(a)(1) An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency as a party to the proceeding was substantially justified or that special circumstances make an award unjust.

Application for fees and expenses, submittal.

"(2) A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an award under this section, and the amount sought, including an itemized statement from any attorney, agent, or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the agency was not substantially justified.

"(3) The adjudicative officer of the agency may reduce the amount to be awarded, or deny an award, to the extent that the party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy. The decision of the adjudicative officer of the agency under this section shall be made a part of the record containing the final decision of the agency and shall include written findings and conclusions and the reason or basis therefor.

Definitions.

"(b)(1) For the purposes of this section—

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"(A) 'fees and other expenses' includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case, and reasonable attorney or agent fees (The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved, and (ii) attorney or agent fees shall not be awarded in excess of $75 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies a higher fee.);

5 USC 551.

"(B) 'party' means a party, as defined in section 551(3) of this title, which is an individual, partnership, corporation, association, or public or private organization other than an agency, but excludes (i) any individual whose net worth exceeded $1,000,000 at the time the adversary adjudication was initiated, and any sole owner of an unincorporated business, or any partnership, corporation, association, or organization whose net worth exceeded $5,000,000 at the time the adversary adjudication was initiated, except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of the Code and a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association, and (ii) any sole owner of an unincorporated business, or any partnership, corporation, association, or organization, having more than 500 employees at the time the adversary adjudication was initiated;

26 USC 501.

5 USC 554.

"(C) 'adversary adjudication' means an adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise, but excludes an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license; and

"(D) 'adjudicative officer' means the deciding official, without regard to whether the official is designated as an administrative law judge, a hearing officer or examiner, or otherwise, who presided at the adversary adjudication.

"(2) Except as otherwise provided in paragraph (1), the definitions provided in section 551 of this title apply to this section.

Applications, uniform procedures.

"(c)(1) After consultation with the Chairman of the Administrative Conference of the United States, each agency shall by rule establish uniform procedures for the submission and consideration of applications for an award of fees and other expenses. If a court reviews the underlying decision of the adversary adjudication, an award for fees and other expenses may be made only pursuant to section 2412(d)(3) of title 28, United States Code.

Fee determination, review.

"(2) A party dissatisfed with the fee determination made under subsection (a) may petition for leave to appeal to the court of the United States having jurisdiction to review the merits of the underlying decision of the agency adversary adjudication. If the court denies the petition for leave to appeal, no appeal may be taken from the denial. If the court grants the petition, it may modify the determination only if it finds that the failure to make an award, or the calculation of the amount of the award, was an abuse of discretion.

"(d)(1) Fees and other expenses awarded under this section may be paid by any agency over which the party prevails from any funds made available to the agency, by appropriation or otherwise, for such purpose. If not paid by any agency, the fees and other expenses shall be paid in the same manner as the payment of final judgments is made pursuant to section 2414 of title 28, United States Code.

Appropriation authorization.

"(2) There is authorized to be appropriated to each agency for each of the fiscal years 1982, 1983, and 1984, such sums as may be necessary to pay fees and other expenses awarded under this section in such fiscal years.

Report to Congress.

"(e) The Chairman of the Administrative Conference of the United States, after consultation with the Chief Counsel for Advocacy of the Small Business Administration, shall report annually to the Congress on the amount of fees and other expenses awarded during the preceding fiscal year pursuant to this section. The report shall describe the number, nature, and amount of the awards, the claims involved in the controversy, and any other relevant information which may aid the Congress in evaluating the scope and impact of such awards. Each agency shall provide the Chairman with such information as is necessary for the Chairman to comply with the requirements of this subsection.".

(2) The table of sections of subchapter I of chapter 5 of title 5, United States Code, is amended by adding at the end thereof the following new item:

"504. Costs and fees of parties.".

(b) Section 202 of the Act entitled "An Act to amend the Small Business Act and Small Business Investment Act of 1958 to provide additional assistance under such Acts, to create a pollution control financing program for small business, and for other purposes" approved June 4, 1976 (15 U.S.C. 634b), is amended—

(1) by striking out "and" after the semicolon in paragraph (9);

(2) by striking out the period at the end of paragraph (10) and inserting in lieu thereof a semicolon and "and"; and

(3) by adding at the end thereof the following new paragraph:

"(11) advise, cooperate with, and consult with, the Chairman of the Administrative Conference of the United States with respect to section 504(e) of title 5 of the United States Code.".

Ante, p. 2325.
Repeal.
5 USC 504.

(c) Effective October 1, 1984, section 504, and the item relating to section 504 in the table of sections, of title 5, United States Code, as added by subsection (a) of this section, are repealed, except that the provisions of such section shall continue to apply through final disposition of any adversary adjudication as defined in subsection (b)(1)(C) of such section, initiated before the date of repeal.

AWARD OF FEES AND OTHER EXPENSES IN CERTAIN JUDICIAL PROCEEDINGS

SEC. 204. (a) Section 2412 of title 28, United States Code, is amended to read as follows:

"§ 2412. Costs and fees

28 USC 1920.

"(a) Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency and any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. A judgment for costs when taxed against the United States shall, in an amount established by statute, court rule, or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation.

"(b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency and any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

Judgment payments.

28 USC 2414, 2517.

"(c)(1) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for costs pursuant to subsection (a) shall be paid as provided in sections 2414 and 2517 of this title and shall be in addition to any relief provided in the judgment.

"(2) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for fees and expenses of attorneys pursuant to subsection (b) shall be paid as provided in sections 2414 and 2517 of this title, except that if the basis for the award is a finding that the United States acted in bad faith, then the award shall be paid by any agency found to have acted in bad faith and shall be in addition to any relief provided in the judgment.

"(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort) brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

Fee and expense applications, submittal.

"(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified.

Awards, reduction or denial.

"(C) The court, in its discretion, may reduce the amount to be awarded pursuant to this subsection, or deny an award, to the extent that the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy.

Definitions.

"(2) For the purposes of this subsection—

"(A) 'fees and other expenses' includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.);

"(B) 'party' means (i) an individual whose net worth did not exceed $1,000,000 at the time the civil action was filed, (ii) a sole owner of an unincorporated business, or a partnership, corporation, association, or organization whose net worth did not exceed $5,000,000 at the time the civil action was filed, except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of the Code and a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association, or (iii) a sole owner of an unincorporated business, or a partnership, corporation, association, or organization, having not more than 500 employees at the time the civil action was filed; and

"(C) 'United States' includes any agency and any official of the United States acting in his or her official capacity.

"(3) In awarding fees and other expenses under this subsection to a prevailing party in any action for judicial review of an adversary adjudication, as defined in subsection (b)(1)(C) of section 504 of title 5, United States Code, or an adversary adjudication subject to the Contract Disputes Act of 1978, the court shall include in that award fees and other expenses to the same extent authorized in subsection (a) of such section, unless the court finds that during such adversary adjudication the position of the United States was substantially justified, or that special circumstances make an award unjust.

Ante, p. 2325.
41 USC 601 note.

"(4)(A) Fees and other expenses awarded under this subsection may be paid by any agency over which the party prevails from any funds made available to the agency, by appropriation or otherwise, for such purpose. If not paid by any agency, the fees and other expenses shall be paid in the same manner as the payment of final judgments is made in accordance with sections 2414 and 2517 of this title.

28 USC 2414, 2517.

Appropriation authorization.

"(B) There is authorized to be appropriated to each agency for each of the fiscal years 1982, 1983, and 1984, such sums as may be necessary to pay fees and other expenses awarded pursuant to this subsection in such fiscal years.

Report to Congress.
28 USC 604.

"(5) The Director of the Administrative Office of the United States Courts shall include in the annual report prepared pursuant to section 604 of this title, the amount of fees and other expenses awarded during the preceding fiscal year pursuant to this subsection. The report shall describe the number, nature, and amount of the awards, the claims involved in the controversy, and any other relevant information which may aid the Congress in evaluating the scope and impact of such awards.".

(b) The item relating to section 2412 in the table of sections for chapter 161 of title 28, United States Code, is amended to read as follows:

"2412. Costs and fees.".

28 USC 2412.

(c) Effective October 1, 1984, subsection (d) of section 2412, as added by subsection (a) of this section, is repealed, except that the provisions of that subsection shall continue to apply through final disposition of any action commenced before the date of repeal.

TECHNICAL AND CONFORMING AMENDMENTS

Repeal.
28 USC app.

SEC. 205. (a) Subdivision (f) of rule 37 of the Federal Rules of Civil Procedure is repealed.

(b) The table of rules of the Federal Rules of Civil Procedure is amended by deleting the item relating to subdivision (f) of rule 37.

(c) Section 722 of the Revised Statutes (42 U.S.C. 1988) is amended by striking out "or in any civil action or proceeding by or on behalf of the United States of America, to enforce, or charging a violation of a provision of the United States Internal Revenue Code,".

26 USC 1.

EFFECT ON OTHER LAWS

28 USC 2412 note.
Ante, p. 2327.

SEC. 206. Nothing in section 2412(d) of title 28, United States Code, as added by section 204(a) of this title, alters, modifies, repeals, invalidates, or supersedes any other provision of Federal law which authorizes an award of such fees and other expenses to any party other than the United States that prevails in any civil action brought by or against the United States.

LIMITATION

5 USC 504 note.

SEC. 207. The payment of judgments, fees and other expenses in the same manner as the payment of final judgments as provided in this Act is effective only to the extent and in such amounts as are provided in advance in appropriations Acts.

EFFECTIVE DATE AND APPLICATION

5 USC 504 note.
Ante, p. 2325.

SEC. 208. This title and the amendments made by this title shall take effect of October 1, 1981, and shall apply to any adversary adjudication, as defined in section 504(b)(1)(C) of title 5, United States Code, and any civil action or adversary adjudication described in section 2412 of title 28, United States Code, which is pending on, or commenced on or after, such date.

TITLE III—SMALL BUSINESS EXPORT EXPANSION ASSISTANCE

Export promotion center, establishment.
15 USC 649a.

SEC. 301. (a) The Secretary of Commerce, after consultation with the Administrator of the Small Business Administration, the President of the Export-Import Bank of the United States, the President of the Overseas Private Investment Corporation, and the Director of the Internal Revenue Service, shall establish an export promotion center in each of two district offices of the International Trade Administration of the Department of Commerce which are located in metropolitan areas where district offices of the Small Business Administration and the Internal Revenue Service exist.

Staff, designation.

(b) The Export-Import Bank of the United States, the Internal Revenue Service, the Overseas Private Investment Corporation, the Department of Commerce, and the Small Business Administration shall each designate at least one full-time employee to serve as such agency's full-time representative in each such center. Each person designated shall be familiar with the needs and problems of small business exporting and shall serve without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and without regard to chapter 51, and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates. Each export promotion center shall serve as a one-stop

5 USC 5101 *et seq.*
5 USC 5331.

information center on Federal Government export assistance, financing programs available to small business, and other provisions of law governing exporting for small business.

Report to congressional committees.

(c) Not later than six months after the enactment of this title, the Secretary of Commerce shall report to the Select Committee on Small Business and the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Small Business and the Committee on Foreign Affairs of the House of Representatives on the progress made in implementing the provisions of this section.

Evaluations, submittal to Congress.

(d) Within two years after the date of enactment of this title, the Secretary of Commerce shall evaluate these export promotion centers, including, but not limited to, an analysis of the effectiveness of the centers in developing and expanding small business exports, and a comparison of the effectiveness of the centers in relation to district offices of the Department of Commerce which do not have an export promotion center. Such evaluation shall be submitted to the committees of the Senate and the House of Representatives referred to in subsection (c).

Effective date. 15 USC 649a note.

(e) This section shall take effect on October 1, 1980, or on the date of the enactment of this section whichever occurs later and shall expire on October 1, 1983.

Grants, contracts, and cooperative agreements. 15 USC 649b.

SEC. 302. (a) The Secretary of Commerce (hereinafter referred to as the "Secretary") is authorized to make grants (including contracts and cooperative agreements) to a qualified applicant to encourage the development and implementation of a small business international marketing program (hereinafter referred to as "the program"). Each qualified applicant under this title may receive a Federal grant not to exceed $150,000 annually for each of three years: *Provided*, That not more than one-third of these Federal funds may be used for the purpose of hiring personnel. Nothing in this section shall be construed as authorizing the Secretary to enter into contracts or incur obligations except to such extent and in such amounts as are provided in appropriation Acts.

Application requirements.

(b)(1) To be eligible for a grant under this section, an applicant proposing to carry out a small business international marketing program must submit to the Secretary an application demonstrating, at a minimum:

(A) the geographical area to be served;

(B) the number of firms to be assisted;

(C) the staff required to administer the program;

(D) the means to counsel small businesses interested in pursuing export sales, including providing information concerning available financing, credit insurance, tax treatment, potential markets and marketing assistance, export pricing, shipping, documentation, and foreign financing and business customs;

(E) the ability to provide market analysis of the export potential of small business concerns; and

(F) the capability for developing contacts with potential foreign customers and distributors for small business and their products, including arrangements and sponsorship of foreign trade missions for small business concerns to meet with identified potential customers, distributors, sales representatives, and organizations interested in licensing or joint ventures: *Provided, however*, That no portion of any Federal funds may be used to directly underwrite any small business participation in foreign trade missions abroad.

Program outreach services.

(2) Program services shall be provided to small business concerns through outreach services at the most local level practicable.

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(3) Each small business international marketing program shall have a full-time staff director to manage program activities, and access to export specialists to counsel and to assist small business clients in international marketing.

Advisory board establishment.

(c)(1) Each small business international marketing program shall establish an advisory board of nine members to be appointed by the staff director of the program, not less than five members of whom shall be small business persons or representatives of small business associations.

(2) Each advisory board shall elect a chairman and shall advise, counsel, and confer with the staff director of the program on all policy matters pertaining to the operation of the program (including who may be eligible to receive assistance, ways to promote the sale of United States products and services in foreign markets or to encourage tourism in the United States, and how to maximize local and regional private consultant participation in the program).

Grant requirements.

(d) The Secretary shall require, as a condition to any grant (or amendment or modification thereof) made to an applicant under this section, that a sum equal to the amount of such grant be provided from sources other than the Federal Government: *Provided*, That the additional amount shall not include any amount of indirect costs or in-kind contributions paid for under any Federal program, nor shall indirect costs or in-kind contributions exceed 50 per centum of the non-Federal additional amount.

Program evaluation.

(e) The Secretary shall develop a plan to evaluate programs approved under this section which shall only—

(1) determine the impact of small business international marketing programs on those small businesses assisted;

(2) determine the amount of export sales generated by small businesses assisted through such programs; and

Report to Congress.

(3) make recommendations concerning continuation and/or expansion of the program and possible improvements in the program structure. Such evaluation shall be submitted to the Congress by October 1, 1982.

(f) For the purpose of the evaluation under subsection (e), the Secretary is authorized to require any small business international marketing program, or party receiving assistance under this section, to furnish such information as is deemed appropriate to complete the required evaluation.

"Applicant."

(g) As used in this section, the term "applicant" means any State government or agency or instrumentality thereof, any Small Business Administration—designated small business development center, any for profit small business, any nonprofit corporation, any regional commission, or any combination of such entities, which will carry out a small business international marketing program.

Contract authority.

(h) The authority to enter into contracts shall be in effect for each fiscal year only to the extent or in the amounts as are provided in advance in appropriation Acts.

15 USC 649c.

Appropriation authorization.

SEC. 303. At least one small business international program shall be established within each region of the Department of Commerce. There are authorized to be appropriated to the Secretary $1,500,000 for each fiscal year 1981, 1982, and 1983, to carry out the program established in section 302.

SEC. 304. The Secretary through the International Trade Administration, shall, only to such extent and in such amounts as are provided in appropriation Acts on and after October 1, 1980, maintain a central clearinghouse to provide for the collection, dissemination, and exchange of information between programs established pursuant to sections 301 and 302 of this title, the Office of International Trade of the Small Business Administration, and other interested concerns.".

Central information clearinghouse.
15 USC 649d.

Approved October 21, 1980.

LEGISLATIVE HISTORY:

HOUSE REPORTS: No. 96-1004 (Comm. on Small Business) and No. 96-1434 (Comm. of Conference).
SENATE REPORT: No. 96-974 (Select Comm. on Small Business).
CONGRESSIONAL RECORD, Vol. 126 (1980):
June 9, 10, considered and passed House.
Sept. 26, considered and passed Senate, amended.
Sept. 30, Senate agreed to conference report.
Oct. 1, House receded and concurred in Senate amendment with an amendment; Senate concurred in House amendment.
WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 16, No. 43:
Oct. 21, Presidential statement.

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96th Congress 2d Session | HOUSE OF REPRESENTATIVES | Report No. 96-1434

SMALL BUSINESS ASSISTANCE AND REIMBURSEMENT FOR CERTAIN FEES

September 30, 1980.—Ordered to be printed

Mr. Smith of Iowa, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany H.R. 5612]

The committee of conference on the disagreeing votes for the two Houses on the amendments of the Senate to the bill (H.R. 5612) to amend section 8(a) of the Small Business Act, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its diagreement to the amendment of the Senate and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the Senate amendment, insert the following:

"Part A—Small Business Administration Minority Business Development Program Amendments

Sec. 101. Section 8(a) of the Small Business Act is amended by striking "September 30, 1980" wherever it appears and by substituting in lieu thereof "September 30, 1981".

Sec. 102. Section 202(b) of the Act entitled "An Act to amend the Small business Act and the Small Business Investment Act of 1958" approved October 24, 1978 (15 U.S.C. 631) is amended by—

(a) redesignating subsection (b) as subsection (b)(1);

(b) striking "June 30, 1980" and inserting in lieu thereof "January 31, 1981"; and

(c) adding at the end thereof a new paragraph as follows:

"(2) The Small Business Administration and the agency designated pursuant to section 8(a)(1)(B) of the Small Business Act shall

submit separate quarterly reports to the Senate Select Committee on Small Business and the Committee on Small Business of the House of Representatives. Such reports shall contain a review and evaluation of all activities conducted pursuant to section 8(a)(1)(B) of the Small Business Act during the previous three-month period including—

"(A) the number, dollar value, and description of all contracts awarded or being reserved for award pursuant to such section;

"(B) the status of all contracts awarded, including percent of completion and a description of problems incurred in the performance and such contracts;

"(C) the impact, if any, on small business concerns resulting from selection of any contract for award under such section; and

"(D) efforts made by the Administration to identify, match, and negotiate procurement requirements pursuant to such section.

The first such report shall be submitted commencing on January 2, 1981, for the preceding three-month period, and shall continue quarterly through, and include, the quarter ending September 30, 1981. The reports shall not be reviewed by any other agency or office prior to their submission.".

Sec. 103. Section 4(b) of the Small Business Act is amended by striking all after the phrase "Capital Ownership Development" through the period and inserting in lieu thereof "and shall be responsible to the Administrator for the formulation and execution of the policies and programs under sections 7(j) and 8(a) of this Act which provide assistance to minority small business concerns.".

Sec. 104. The second sentence of section 7(j)(10) of the Small Business Act is amended to read as follows: "The program, and all other services and activities authorized under section 7(j) and 8(a) of this Act, shall be managed by the Associate Administrator for Minority Small Business and Capital Ownership Development under the supervision of, and responsible to, the Administrator."

Sec. 105. Section 8(a)(8) of the Small Business Act is amended to read as follows:

"(8) All determinations made pursuant to paragraph (5) with respect to whether a group has been subjected to prejudice or bias shall be made by the Administrator after consultation with the Associate Administrator for Minority Small Business and Capital Ownership Development. All other determinations made pursuant to paragraphs (4), (5), (6), and (7) shall be made by the Associate Administrator for Minority Small Business and Capital Ownership Development under the supervision of, and responsible to, the Administrator.".

Sec. 106. (a) Section 7(j)(10)(A)(i) of the Small Business Act is amended by striking the semicolon at the end thereof and inserting in lieu thereof "for correcting the impairment of such concern's ability to compete, as determined for such concern pursuant to section 8(a)(6) of this Act, within a fixed period of time as mutually agreed upon by the applicant and the Administrator prior to acceptance in such Program: Provided, That not less than one year prior to the expiration of such period, and upon the request of such concern, the Administration shall review such period and may extend such *period as necessary and appropriate: Provided further, That no determination made under this paragraph shall be considered a denial of total participation for the purposes of section 8(a)(9) of this Act;";*

(b) Notwithstanding the provisions of subsection (a) of this section, for concerns eligible to receive contracts pursuant to section 8(a) of the Small Business Act on the effective date of the amendment made by this section, each such concern shall submit to the Small Business Administration within two months after the promulgation of final regulations issued within one hundred twenty days after the enactment of this Act the business plan required under section 7(j)(10)(A)(i) of the Small Business Act, as amended by subsection (a) of this section: Provided however, That the period of time required under section 7(j)(10)(A)(i) of the Small Business Act, as amended by subsection (a) of this section, shall be fixed as mutually agreed upon by the program participant and the Small Business Administration prior to the awarding or extending of contracts to such concern pursuant to section 8(a) of the Small Business Act after June 1, 1981, but the period shall be fixed in no case later than eighteen months after the effective date of this Act: Provided further, That no determination made under this paragraph shall be considered a denial of total participation for the purposes of section 8(a)(9) of the Small Business Act.

SEC. 107. Section 7(j)(10)(C) of the Small Business Act is amended to read as follows:

"(C) No small business concern shall receive a contract pursuant to section 8(a) of this Act unless—

"(i) the business plan required pursuant to section 7(j)(10)(A)(i) is approved by the Administration; and

"(ii) the program is able to provide such concern with, but not limited to, such management, technical and financial services as may be necessary to achieve the targets, objectives, and goals of such business.".

SEC. 108. The second sentence of section 3(a) of the Small Business Act is amended by striking "business." and inserting in lieu thereof "business: Provided, That the Administration shall not promulgate, amend, or rescind any rule regulation with respect to size standards prior to March 31, 1981.".

PART B—SMALL BUSINESS EXPORT FINANCING

SEC. 110. This part may be cited as the "Small Business Export Expansion Act of 1980".

SEC. 111. (a) The Congress finds and declares that—

(1) a strong export policy is essential to the health and wellbeing of the United States economy;

(2) exports of goods and services account for one out of every six jobs in the manufacturing sector and 10 per centum of the gross national product;

(3) every billion dollars in new exports is estimated to provide forty thousand jobs;

(4) there is increased and fierce competition in international markets to United States goods and services;

(5) small businesses account for no more than 10 per centum of all United States export sales;

(6) Federal Government programs are not sufficently responsive to the needs of small business for export education and development of overseas marketing opportunities necessary to insure that small businesses realize their potential; and

(7) it is in the national interest to systematically and consistently promote and encourage small business participation in international markets.

(b) It is therefore the purpose of this part to encourage and promote small business exporting by—

(1) providing educational and marketing assistance to small businesses;

(2) insuring better access to export information and assistance for small businesses by upgrading and expanding the export development programs and services of the Department of Commerce and the Small Business Administration; and

(3) promoting the competitive viability of such firms in export trade and encouraging increased tourism in the United States by creating a program to provide limited financial, technical, and management assistance as may be necessary.

SEC. 112. Section 7(a) of the Small Business Act is amended by inserting before the phrase "The foregoing powers shall be subject, however," the following new sentences: "The Administration is further empowered, only to such extent and in such amounts as are provided in appropriation Acts, to make or effect either directly or in cooperation with banks or other lending institutions through agreements to participate on an immediate or deferred basis extensions and revolving lines of credit for export purposes to enable small business concerns to develop foreign markets and for preexport financing: Provided, however, That no such extension or revolving line of credit may be made for a period or periods exceeding eighteen months. A bank or participating lending institution may establish the rate of interest on extensions and revolving lines of credit as may be legal and reasonable."

SEC. 113. The Small Business Act is amended by adding after section 21 the following new section.

"SEC. 22. (a) There is established within the Administration an Office of International Trade which shall implement the programs pursuant to this section.

"(b) The office shall promote sales opportunities for small business goods and services abroad. To accomplish this objective the office shall—

"(1) provide small businesses with access to current and complete export information by—

"(A) making available, at the Adminstration's regional offices through cooperation with the Department of Commerce, export information, including, but not limited to, the worldwide information and trade system and world trade data reports;

"(B) maintaining a current list of financial institutions that finance export operations;

"(C) maintaining a current directory of all Federal, regional, State and private sector programs that provide export information and assistance to small businesses; and

"(D) preparing and publishing such reports as it determines to be necessary concerning market conditions, sources

of financing, export promotion programs, and other information pertaining to the needs of small business exporting firms so as to insure that the maximum information is made available to small buisnesses in a readily usable form;

"(2) encourage through cooperation with the Department of Commerce, greater small business participation in trade fairs, shows, missions, and other domestic and overseas export development activities of the Department of Commerce; and

"(3) facilitate decentralized delivery of export information and assistance to small businesses by assigning full-time export development specialists to each Administration regional office and assigning primary responsibility for export development to one person in each district office. Such specialists shall—

"(A) assist small businesses in obtaining export information and assistance from other Federal departments and agencies;

"(B) maintain a current directory of all programs which provide export information and assistance to small businesses within the region;

"(C) encourage financial institutions to develop and expand programs for export financing;

"(D) provide advice to Administration personnel involved in granting loans, loan guarantees, and extensions and revolving lines of credit, and providing other forms of assistance to small businesses engaged in exports; and

"(E) within one hundred and eighty days of their appointment, participate in training programs designed by the Administrator, in conjunction with the Department of Commerce and other Federal departments and agencies, to study export programs and to examine small businesses' needs for export information and assistance.".

(b) The amendment made by subsection (a) shall take effect on October 1, 1980, or the date of enactment of this Act, whichever occurs later.

TITLE II—EQUAL ACCESS TO JUSTICE ACT

SEC. 201. This title may be cited as the "Equal Access to Justice Act".

FINDINGS AND PURPOSE

SEC. 202. (a) The Congress finds that certain individuals, partnerships, corporations, and labor and other organizations may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights in civil actions and in administrative proceedings.

(b) The Congress further finds that because of the greater resources and expertise of the United States the standard for an award of fees against the United States should be different from the standard governing an award against a private litigant, in certain situations.

(c) It is the purpose of this title—

(1) to diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in specified situations an award of attorney fees, expert witness fees, and other costs against the United States; and

(2) to insure the applicability in actions by or against the United States of the common law and statutory exceptions to the "American rule" respecting the award of attorney fees.

AWARD OF FEES AND OTHER EXPENSES IN CERTAIN AGENCY ACTIONS

SEC. 203. (a)(1) Subchapter I of chapter 5 of title 5, United States Code, is amended by adding at the end thereof the following new section:

"§ 504. Costs and fees of parties

"(a)(1) An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency as a party to the proceeding was substantially justified or that special circumstances make an award unjust.

"(2) A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an award under this section, and the amount sought, including an itemized statement from any attorney, agent, or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the agency was not substantially justified.

"(3) The adjudicative officer of the agency may reduce the amount to be awarded, or deny an award, to the extent that the party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy. The decision of the adjudicative officer of the agency under this section shall be made a part of the record containing the final decision of the agency and shall include written findings and conclusions and the reason or basis therefor.

"(b)(1) For the purposes of this section—

"(A) 'fees and other expenses' includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case, and reasonable attorney or agent fees. (The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved, and (ii) attorney or agent fees shall not be awarded in excess of $75 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies a higher fee.);

"(B) 'party' means a party, as defined in section 551(3) of this title, which is an individual, partnership, corporation, association, or public or private organization other than an agency, but excludes (i) any individual whose net worth exceeded $1,000,000 at the time the adversary adjudication was initiated, and any sole owner of an unincorporated business, or any partnership, corporation, association, or organization whose net worth exceeded $5,000,000 at the time the adversary adjudication was initiated, except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of the Code and a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association, and (ii) any sole owner of an unincorporated business, or any partnership, corporation, association, or organization, having more than 500 employees at the time the adversary adjudication was initiated;

"(C) 'adversary adjudication' means an adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise, but excludes an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license; and

"(D) 'adjudicative officer' means the deciding official, without regard to whether the official is designated as an administrative law judge, a hearing officer or examiner, or otherwise, who presided at the adversary adjudication.

"(2) Except as otherwise provided in paragraph (1), the definitions provided in section 551 of this title apply to this section.

"(c)(1) After consultation with the Chairman of the Administrative Conference of the United States, each agency shall by rule establish uniform procedures for the submission and consideration of applications for an award of fees and other expenses. If a court reviews the underlying decision of the adversary adjudication, an award for fees and other expenses may be made only pursuant to section 2412(d)(3) of title 28, United States Code.

"(2) A party dissatisfied with the fee determination made under subsection (a) may petition for leave to appeal to the court of the United States having jurisidication to review the merits of the underlying decision of the agency adversary adjudication. If the court denies the petition for leave to appeal, no appeal may be taken from the denial. If the court grants the petition, it may modify the determination only if it finds that the failure to make an award, or the calculation of the amount of the award, was an abuse of discretion.

"(d)(1) Fees and other expenses awarded under this section may be paid by any agency over which the party prevails from any funds made available to the agency, by appropriation or otherwise, for such purpose. If not paid by any agency, the fees and other expenses shall be paid in the same manner as the payment of final judgments is made pursuant to section 2414 of title 28, United States Code.

"(2) There is authorized to be appropriated to each agency for each of the fiscal years 1982, 1983, and 1984, such sums as may be necessary to pay fees and other expenses awarded under this section in such fiscal years.

"(e) the Chairman of the Administrative Conference of the United States, after consultation with the Chief Counsel for Advocacy of the Small Business Administration, shall report annually to the Congress on the amount of fees and other expenses awarded during the preceding fiscal year pursuant to this section. The report shall describe the number, nature, and amount of the awards, the claims involved in the controversy, and any other relevant information which may aid the Congress in evaluating the scope and impact of such awards. Each agency shall provide the Chairman with such information as is necessary for the Chairman to comply with the requirements of this subsection.".

(2) The table of sections of subchater I of chapter 5 of title 5, United States Code, is amended by adding at the end thereof the following new item:

"504. Costs and fees of parties.".

(b) Section 202 of the Act entitled "An Act to amend the Small Business Act and Small Business Investment Act of 1958 to provide additional assistance under such Acts, to create a pollution control financing program for small business, and for other purposes" approved June 4, 1976 (15 U.S.C. 634b), is amended—

(1) by striking out "and" after the semicolon in paragraph (9);

(2) by striking out the period at the end of paragraph (10) and inserting in lieu thereof a semicolon and "and"; and

(3) by adding at the end thereof the following new paragraph:

"(11) advise, cooperate with, and consult with, the Chairman of the Administrative Conference of the United States with respect to section 504 (e) of title 5 of the United States Code.".

(c) Effective October 1, 10984, section 504, and the item relating to section 504 in the table of sections, of title 5, United States Code, as added by subsections (a) of this section, are repealed, except that the provisions of such section shall continue to apply through final disposition of any adversary adjudication as defined in subsection (b) (1) (C) of such section, initiated before the date of repeal.

AWARD OF FEES AND OTHER EXPENSES IN CERTAIN JUDICIAL PROCEEDINGS

SEC. 204. (a) Section 2412 of title 28, United States Code, is amended to read as follows:

"§ *2412. Costs and fees*

"(a) Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency and any official of the United States acting in his or here official capacity in any court having jurisdiction of such action. A judgment for costs when taxed against the United States shall, in an amount established by statute, court rule, or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation.

"(b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or

any agency and any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

"(c)(1) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for costs pursuant to subsection (a) shall be paid as provided in sections 2414 and 2517 of this title and shall be in addition to any relief provided in the judgment.

"(2) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for fees and expenses of attorneys pursuant to subsection (b) shall be paid as provided in sections 2414 and 2517 of this title, except that if the basis for the award is a finding that the United States acted in bad faith, then the award shall be paid by any agency found to have acted in bad faith and shall be in addition to any relief provided in the judgment.

"(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort) brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

"(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified.

"(C) The court, in its discretion, may reduce the amount to be awarded pursuant to this subsection, or deny an award, to the extent that the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy.

"(2) For the purposes of this subsection—

> *"(A) 'fees and other expenses' includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as*

the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.);

"(B) 'party' means (i) an individual whose net worth did not exceed $1,000,000 at the time the civil action was filed, (ii) a sole owner of an unincorporated business, or a partnership, corporation, association, or organization whose net worth did not exceed $5,000,000 at the time the civil action was filed, except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of the Code and a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association, or (iii) a sole owner of an unincorporated business, or a partnership, corporation, association, or organization, having not more than 500 employees at the time the civil action was filed; and

"(C) 'United States' includes any agency and any official of the United States acting in his or her official capacity.

"(3) In awarding fees and other expenses under this subsection to a prevailing party in any action for judicial review of an adversary adjudication, as defined in subsection (b)(1)(C) of section 504 of title 5, United States Code, or an adversary adjudication subject to the Contract Disputes Act of 1978, the court shall include in that award fees and other expenses to the same extent authorized in subsection (a) of such section, unless the court finds that during such adversary adjudication the position of the United States was substantially justified, or that special circumstances make an award unjust.

"(4)(A) Fees and other expenses awarded under this subsection may be paid by any agency over which the party prevails from any funds made available to the agency, by appropriation or otherwise, for such purpose. If not paid by any agency, the fees and other expenses shall be paid in the same manner as the payment of final judgments is made in accordance with sections 2414 and 2517 of this title.

"(B) There is authorized to be appropriated to each agency for each of the fiscal years 1982, 1983, and 1984, such sums as may be necessary to pay fees and other expenses awarded pursuant to this subsection in such fiscal years.

"(5) The Director of the Administrative Office of the United States Courts shall include in the annual report prepared pursuant to section 604 of this title, the amount of fees and other expenses awarded during the preceding fiscal year pursuant to this subsection. The report shall describe the number, nature, and amount of the awards, the claims involved in the controversy, and any other relevant information which may aid the Congress in evaluating the scope and impact of such awards.".

(b) The item relating to section 2412 in the table of sections for chapter 161 of title 28, United States Code, is amended to read as follows:

"2412. Costs and fees.".

(c) Effective October 1, 1984, subsection (d) of section 2412, as added by subsection (a) of this section, is repealed, except that the provisions of that subsection shall continue to apply through final disposition of any action commenced before the date of repeal.

TECHNICAL AND CONFORMING AMENDMENTS

SEC. 205. (a) Subdivision (f) of rule 37 of the Federal Rules of Civil Procedure is repealed.

(b) The table of rules of the Federal Rules of Civil Procedure is amended by deleting the item relating to subdivision (f) of rule 37.

(c) Section 722 of the Revised Statutes (42 U.S.C. 1988) is amended by striking out "or in any civil action or proceeding by or on behalf of the United States of America, to enforce, or charging a violation of a provision of the United States Internal Revenue Code,".

EFFECT ON OTHER LAWS

SEC. 206. Nothing in section 2412(d) of title 28, United States Code, as added by section 204(a) of this title, alters, modifies, repeals, invalidates, or supersedes any other provision of Federal law which authorizes an award of such fees and other expenses to any party other than the United States that prevails in any civil action brought by or against the United States.

EFFECTIVE DATE AND APPLICATION

SEC. 207. This title and the amendments made by this title shall take effect of October 1, 1981, and shall apply to any adversary adjudication, as defined in section 504(b)(1)(C) of title 5, United States Code, and any civil action or adversary adjudication described in section 2412 of title 28, United States Code, which is pending on, or commenced on or after, such date.

TITLE III—SMALL BUSINESS EXPORT EXPANSION ASSISTANCE

SEC. 301. (a) The Secretary of Commerce, after consultation with the Administrator of the Small Business Administration, the President of the Export-Import Bank of the United States, the President of the Overseas Private Investment Corporation, and the Director of the Internal Revenue Service, shall establish an export promotion center in each of two district offices of the International Trade Administration of the Department of Commerce which are located in metropolitan areas where district offices of the Small Business Administration and the Internal Revenue Service exist.

(b) The Export-Import Bank of the United States, the Internal Revenue Service, the Overseas Private Investment Corporation, the Department of Commerce, and the Small Business Administration shall each designate at least one full-time employee to serve as such agency's full-time representative in each such center. Each person designated shall be familiar with the needs and problems of small business exporting and shall serve without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and without regard to chapter 51, and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates. Each export promotion center shall serve as a one-stop information center on Federal Government export assistance, financing programs available to small business, and other provisions of law governing exporting for small business.

(c) Not later than six months after the enactment of this title, the Secretary of Commerce shall report to the Select Committee on Small Business and the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Small Business and the Committee on Foreign Affairs of the House of Representatives on the progress made in implementing the provisions of this section.

(d) Within two years after the date of enactment of this title, the Secretary of Commerce shall evaluate these export promotion centers, including, but not limited to, an analysis of the effectiveness of the centers in developing and expanding small business exports, and a comparison of the effectiveness of the centers in relation to district offices of the Department of Commerce which do not have an export promotion center. Such evaluation shall be submitted to the committees of the Senate and the House of Representatives referred to in subsection (c).

(e) This section shall take effect on October 1, 1980, or on the date of the enactment of this section whichever occurs later and shall expire on October 1, 1983.

SEC.302. (a) The Secretary of Commerce (hereinafter referred to as the "Secretary") is authorized to make grants (including contracts and cooperative agreements) to a qualified applicant to encourage the development and implementation of a small business international marketing program (hereinafter referred to as "the program"). Each qualified applicant under this title may receive a Federal grant not to exceed $150,000 annually for each of three years: Provided, That not more than one-third of these Federal funds may be used for the purpose of hiring personnel. Nothing in this section shall be construed as authorizing the Secretary to enter into contracts or incur obligations except to such extent and in such amounts as are provided in appropriation Acts.

(b)(1) To be eligible for a grant under this section, an applicant proposing to carry out a small business international marketing program must submit to the Secretary an application demonstrating, at a minimum:

(A) the geographical area to be served;

(B) the number of firms to be assisted;

(C) the staff required to administer the program;

(D) the means to counsel small businesses interested in pursuing export sales, including providing information concerning available financing, credit insurance, tax treatment, potential markets and marketing assistance, export pricing, shipping, documentation, and foreign financing and business customs;

(E) the ability to provide market analysis of the export potential of small business concerns; and

(F) the capability for developing contacts with potential foreign customers and distributors for small business and their products, including arrangements and sponsorship of foreign trade missions for small business concerns to meet with identified potential customers, distributors, sales representatives, and organizations interested in licensing or joint ventures: Provided, however, That no portion of any Federal funds may be used to directly underwrite any small business participation in foreign trade missions abroad.

(2) Program services shall be provided to small business concerns through outreach services at the most local level practicable.

(3) Each small business international marketing program shall have a full-time staff director to manage program activities, and access to export specialists to counsel and to assist small business clients in international marketing.

(c)(1) Each small business international marketing program shall establish an advisory board of nine members to be appointed by the staff director of the program, not less than five members of whom shall be small business persons or representatives of small business associations.

(2) Each advisory board shall elect a chairman and shall advise, counsel, and confer with the staff director of the program on all policy matters pertaining to the operation of the program (including who may be eligible to receive assistance, ways to promote the sale of United States products and services in foreign markets or to encourage tourism in the United States, and how to maximize local and regional private consultant participation in the program).

(d) The Secretary shall require, as a condition to any grant (or amendment or modification thereof) made to an applicant under this section, that a sum equal to the amount of such grant be provided from sources other than the Federal Government: Provided, That the additional amount shall not include any amount of indirect costs or in-kind contributions paid for under any Federal program, nor shall indirect costs or in-kind contributions exceed 50 per centum of the non-Federal additional amount.

(e) The Secretary shall develop a plan to evaluate programs approved under this section which shall only—

(1) determine the impact of small business international marketing programs on those small businesses assisted;

(2) determine the amount of export sales generated by small businesses assisted through such programs; and

(3) make recommendations concerning continuation and/or expansion of the program and possible improvements in the program structure. Such evaluation shall be submitted to the Congress by October 1, 1982.

(f) For the purpose of the evaluation under subsection (e), the Secretary is authorized to require any small business international marketing program, or party receiving assistance under this section, to furnish such information as is deemed appropriate to complete the required evaluation.

(g) As used in this section, the term "applicant" means any State government or agency or instrumentality thereof, any Small Business Administration—designated small business development center, any for profit small business, any nonprofit corporation, any regional commission, or any combination of such entities, which will carry out a small business international marketing program.

(h) The authority to enter into contracts shall be in effect for each fiscal year only to the extent or in the amounts as are provided in advance in appropriation Acts.

SEC. 303. At least one small business international program shall be established within each region of the Department of Commerce. There are authorized to be appropriated to the Secretary $1,500,000 for each fiscal year 1981, 1982, and 1983, to carry out the program established in section 302.

SEC. 304. The Secretary through the International Trade Administration, shall, only to such extent and in such amounts as are provided in appropriation Acts on and after October 1, 1980, maintain a central clearinghouse to provide for the collection, dissemination, and exchange of information between programs established pursuant to sections 301 and 302 of this title, the Office of International Trade of the Small Business Administration, and other interested concerns.".

Amend the title so as to read:

> An Act to amend the Small Business Act, to provide for the payment of the United States of certain fees an costs incurred by prevailing parties in Federal agency adjudications and in civil actions in courts of the United States, and for other purposes.

And the Senate agree to the same.

NEAL SMITH,
FERNAND J. ST GERMAIN,
JOHN J. LAFALCE,
JAMES C. CORMAN
JOSEPH P. ADDABBO,
PARREN J. MITCHELL,
ANDY IRELAND,
IKE SKELTON,
JOE MCDADE,
DOUGLAS BEREUTER,
ARLEN ERDAHL
JOHN PORTER,

As additional conferees solely for consideration of title III of the Senate amendment:

CLEMENT J. ZABLOCKI,
JONATHAN B. BINGHAM,
ROBERT J. LAGOMARSINO,
Managers on the Part of the House.

GAYLORD NELSON,
ROBERT MORGAN,
CARL LEVIN,
LOWELL WEICKER,
ORRIN G. HATCH,

As additional conferees solely for consideration of title II of the Senate amendment:

DENNIS DECONCINI,
ROBERT DOLE,
Managers on the Part of the Senate.

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (H.R. 5612) to amend section 8(a) of the Small Business Act, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report.

The Senate amendment struck all of the House bill after the enacting clause and inserted a substitute text.

The House recedes from its disagreement to the amendment of the Senate with an amendment which is a substitute for the House bill and the Senate amendment. The principle differences among the House bill, the Senate amendment, and the substitute agreed to in conference are noted below, except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clarifying changes.

PART A—SBA MINORITY BUSINESS

1. 8(a) PILOT PROGRAM

The pilot program authorizing SBA to select Federal contracts from one agency (the President selected the Department of the Army) for inclusion in the 8(a) program expires September 30, 1980.

The House bill extends this program for two years.

The Senate bill extends it for one year.

The conference substitute extends it for one year.

While the conferees believe it desirable and necessary that SBA have increased authority to select contracts for award through the 8(a) program, as provided for in the pilot program, we firmly believe that this authority should not be used in a manner detrimental to the general small business community.

Taking contracts from the small business community when such contracts represent a traditionally significant part of the Federal purchase dollar to small business is not the intent of the 8(a) program Instead, we firmly believe that a conscious and deliberate effort by the Government to decrease the share of the Federal procurement budget spent with large business concerns, is the fundamental prerequisite for both increasing awards to small business and for securing an increase in the number and quality of contracts selected for 8(a) program. It is the conferees' further belief that SBA should attempt to obtain, insofar as practical, a selection of contract requirements which will result in a broad geographic dispersal of work so that the program will have a more representative base for proper evaluation.

The SBA is strongly urged to conduct its programs guided by these principles and not to engage in practices which merely result in shifting contracts between the small and small minority business community, while large business continues to maintain its disproportionate share of the Federal procurement dollar.

2. GRADUATION FROM 8(a) PROGRAM

SBA has the authority to graduate or terminate firms participating in the 8(a) program and to fix in advance the anticipated date for such graduation.

The Senate bill requires that SBA determine an anticipated graduation date and that the date be included in the business plan of the 8(a) contractor. One year prior to reaching such date, and upon the request of the 8(a) contractor, SBA shall review and extend the date as necessary and appropriate. The Senate bill further provides that no small business concern could receive an 8(a) contract unless the business plan, including a fixed graduation date, was approved by SBA.

Under the Senate bill, neither the establishment of a graduation date, SBA's extension of such a date, or a firm's completion of the participation period, shall be considered a denial of total participation requiring an administrative hearing under section 8(a)(9) of the Small Business Act.

The House bill contains no comparable provision.

The conference substitute requires that the anticipated graduation date be included in the business plan of the 8(a) contractor. It also provides that one year prior to reaching such date, and upon the request of the 8(a) contractor, SBA shall review and may extend the date if necessary and appropriate.

The conference substitute further provides that the graduation date shall be fixed by the SBA after negotiation with the program participant or applicant and subject to mutual agreement of the parties.

It also provides that small business concerns now participating in the program, and new applicants, must submit a business plan with specific business targets, objectives, and goals aimed at correcting the economic impairment which, in part, qualified the firm for 8(a) program, and containing a graduation date from the program. This graduation date is to be the same time that SBA determines that the financial, management, technical and contract support provided to the 8(a) concern will overcome the economic disadvantage determined to exist pursuant to section 8(a)(6). Small business concerns now participating in the program must submit the revised business plan within two months after promulgation of final regulations implementing the new requirements.

The implementing regulations should take into account the following factors among others: the amount of SBA assistance needed to correct the impairment of 8(a) concerns, the individual characteristics of the 8(a) concern, the locale in which the firm conducts its business, the nature of the industry and the availability of private sector capital and procurement to assist the firm in achieving maturity in the American economic system.

New applicants must have an approved business plan containing a fixed graduation date before they can be awarded any contract. Existing program participants must have a fixed graduation date prior to the receipt of any new contract or an extension of an existing one after June 1, 1981; however, the graduation date for existing 8(a) concerns shall be fixed in no case later than eighteen months after the effective date of this act.

Under the conference substitute neither the establishment of a graduation date, SBA's extension of such a date, or a firm's completion of the participation period, shall be considered a denial of total participation requiring an adminstrative hearing under section 8(a)(9) of the Small business Act.

3. PILOT PROGRAM FOR SURETY BOND WAIVERS FOR 8(a) CONTRACTORS

A pilot program authorizing SBA to waive surety bonds on certain 8(a) contractors expires September 30, 1980.

The House bill extends this pilot program for two additional years.

The Senate bill contains no comparable provision.

The conference substitute extends the program for one year.

The conferees direct the SBA to publish final regulations implementing this program within ninety days after the effective date of this Act.

AUTHORITY OF ASSOCIATE ADMINISTRATOR FOR MINORITY SMALL BUSINESS AND CAPITAL OWNERSHIP DEVELOPMENT REGARDING 8(a) PROGRAM ELIGIBILITY

The Small Business Act specifically confers upon the Associate Administrator for Minority Small Business and Capital Ownership Development authority for all determinations of eligibility for the 8(a) program.

The Senate bill provides that all determinations of eligibility be made by the Associate Administrator for Minority Small Business and Capital Ownership Development with the concurrence of the Administrator.

The House bill contains no comparable provision.

The conference substitute provides that all determinations made pursuant to paragraph (5) of section 8(a) with respect to whether a group has been subjected to prejudice or bias shall be made by the Administrator after consultation with the Associate Administrator for Minority Small Business and Capital Ownership Development. All other determinations made pursuant to paragraphs (4), (5), (6), and (7) shall be made by the Associate Administrator for Minority Small Business and Capital Ownership Development under the supervision of, and responsible to, the Administrator.

Finally the conference substitute specifically provides that the Associate Administrator for Minority Small Business and Capital Ownership Development shall be responsible to the Administrator for the formulation and execution of the policies and programs under sections 7(j) and 8(a) of the Act which provide assistance to minority small business concerns.

AUTHORITY OF ASSOCIATE ADMINISTRATOR FOR MINORITY SMALL BUSINESS AND CAPITAL OWNERSHIP DEVELOPMENT REGARDING 7(j) PROGRAM

The Small Business Act specifically confers upon the Associate Administrator for Minority Small Business and Capital Ownership

Development authority over the 7(j) management assistance program.

The Senate bill confers this authority on the Administrator rather than the Associate Administrator (other provisions of law authorize the Administrator to delegate the authority to the Associate Administrator).

The House bill contains no comparable provision.

The conference substitute provides that the 7(j) program shall be managed by the Associate Administrator under the supervision of, and responsible to, the Administrator.

The conferees seek to clarify the SBA internal line of authority, and responsibility, through the amendments to the Small Business Act made by sections 103, 104 and 105.

Section 103, amending the general agency management section, clarifies that the Associate Administrator for Minority Small Business and Capital Ownership Development, who is appointed by the Administrator, is also responsible to the Administrator for his actions taken in formulating and executing both the policies and programs established in law.

Section 104, relating to the Capital Ownership Development Program authority, restates the authority relationship set forth in section 103, but clearly provides that the conferees expect that day-to-day management of the minority small business programs shall to be carried out by the Associate Administrator for Minority Small Business. Nevertheless, the Administrator retains a broad supervisory role over, and ultimate responsibility for, the actions taken to carry out the statutory mandates established in section 7(j) and 8(a).

Section 105, relating to the determinations of eligibility for admission into the 8(a) program, clarifies that current final authority for "group designations" as provided for in section 8(a)(5) of the Small Business Act is in the Administrator. Furthermore, to insure consistent application of the minority business development programs, conferees provide that the determinations of "group" eligibility under the agency's regulatory authority be made after consultation with the Associate Administrator. While all determinations of eligibility are important, all other eligibility determinations are based on the individual characteristics of particular concerns. To minimize the additional layers of review while insuring both consistency and control, conferees have provided that all decisions other than those relating to "group eligibility" shall be made by the Associate Administrator under the supervision of, and responsible to, the Administrator.

6. REPORTS

Existing law requires the General Accounting Office to evaluate both the 8(a) pilot program and the surety bond waiver pilot program and report to Congress by June 30, 1980.

The House bill delays the report to January 1, 1981 and also requires quarterly reports from both SBA and the Department of Army (or the agency designated by the President to participate in the 8(a) pilot program) during the time when the pilot program is being conducted.

The Senate bill contains no comparable provision.

The conference substitute delays the GAO report until January 31, 1981 and requires quarterly reports from both SBA and the Department of the Army (or the agency designated by the President to participate in the 8(a) pilot program) during the time when the pilot program is being conducted.

The conferees are aware that the General Accounting Office provided its report on the surety bond waiver program on August 20, 1980, and has indicated its intention to provide the report on the "Army pilot" program in December 1980. The change in the reporting date established in law is to insure that timely information is made available to GAO to complete their report. Should circumstances warrant, the conferees would expect GAO to update, if appropriate, the surety bond report.

The quarterly reports added to this section are to insure that SBA and the pilot agency are independently able to provide the oversight committees with full, and frank, information on the continued implementation and success of the extension of contract authority to the Small Business Administration.

7. SMALL BUSINESS SIZE STANDARDS

The Senate bill prohibits the SBA for promulgating, amending or rescinding any rule or regulation with respect to size standards prior to March 31, 1981.

The House bill contains no comparable provision.

The conference substitute adopts the Senate provision.

It is clearly the intent of the conferees to allow the SBA to initiate formal rule-making procedures during this interim period. However, such provision would not allow ABA to promulgate any final rule with respect to size standards until March 31, 1981. Such a provision will insure the opportunity for careful congressional scrutiny of any change on the definition of a small business by the Agency.

PART B—SMALL BUSINESS EXPORTS

8. SMALL BUSINESS EXPORT EXPANSION ACT

The Senate bill includes provisions cited as the "Small Business Export Expansion Act of 1980".

The House bill contains no comparable provision.

The conference substitute adopts the Senate provision.

9. CONGRESSIONAL FINDINGS AND DECLARATIONS REGARDING SMALL BUSINESS EXPORTS

The Senate bill makes findings and declarations concerning the importance of exports to the national economy, the lack of Federal assistance to small business to further small business exports and the low amount of exports by small business. The Senate bill also provides that it is the purpose of these provisions of the Senate bill to encourage and promote small business exporting by certain enumerated Federal actions.

The House bill contains no comparable provisions.

The conference substitute adopts the Senate provision.

10. 7(a) LOANS TO FINANCE EXPORT ASSISTANCE

The Senate bill specifically authorizes the use of 7(a) regular business loans to small business to finance export assistance. The Senate bill also specifically authorizes SBA to provide extensions and revolving lines of credit for export purposes to small business concerns to develop foreign markets and for pre-export financing. The maximum term would be eighteen months and guarantee could be in an amount not to exceed $750,000.

The House bill contains no comparable provision.

The conference substitute adopts the Senate provision but deletes the increased guarantees authority from $500,000 to $750,000.

The conferees suggest that SBA, in administering the new guarantee of revolving lines of credit program, take affirmative steps to moderate the agency's default rate. Such steps might include (1) phasing out agency participation gradually at the end of the eighteen months guarantee period either by amortizing the guarantee itself; providing for the conversion of the line of credit into an amortized term loan guarantee by SBA; or refinancing the line of credit with an amortized term loan guaranteed by SBA; and (2) requiring a servicing plan from participating lenders that conforms to industry norms for revolving lines of credit and ensures that the line will actually revolve.

11. OFFICE OF INTERNATIONAL TRADE

The Senate bill establishes within SBA an Office of International Trade to promote sales opportunities for small business goods and services abroad. The Office would be required to:

(1) provide small businesses with access to current and complete export information;

(2) encourage, through cooperation with the Department of Commerce, greater small business participation in trade fairs, shows, missions, and other export development activities of the Department of Commerce; and

(3) facilitate decentralized delivery of export information and assistance to small businesses by assigning full-time export development specialists to each SBA regional office.

The House bill contains no comparable provisions.

The conference substitute adopts the Senate provision but also requires SBA to assign primary responsibility for export development to one person in each district office.

Conferees expect that in major SBA offices and export cities, at least one person would be heavily engaged in export promotion, assisted by such additional staff as useful and appropriate. Conferees recognize that in smaller district offices or those located in cities not extensively involved in exporting, that those responsibilities will be in addition to other staff functions.

12. EQUAL ACCESS TO JUSTICE ACT

The Senate bill includes provisions cited as the "Equal Access to Justice Act".

The House bill contains no comparable provision, but the Senate provision is virtually identical to S. 265, as reported by the House Judiciary Committee.

The conference substitute adopts the Senate provision.

13. CONGRESSIONAL FINDINGS AND PURPOSE

The Senate bill makes findings that certain named entities may be deterred from seeking review of or defending against unreasonable governmental action because of the expense involved and that because of the greater resources and expertise of the United States the standard for an award of fees against the United States should be different from the standard governing an award against a private litigant in certain situations. The purpose of the Act is to diminish this deterrent effect by providing in specified situations for an award of attorney fees and other costs and to insure the applicability in actions involving the United States of the common law and statutory exceptions to the "American rule" respecting the award of attorney fees.

The House bill contains no comparable provision, but the Senate provision is identical to a similar provision in S. 265, as reported by the House Judiciary Committee.

The conference substitute adopts the Senate provision.

14. AGENCY ACTIONS—AWARD OF FEES AND OTHER EXPENSES IN CERTAIN AGENCY ACTIONS

The Senate bill requires a Federal agency or department that conducts an adversary adjudication to award to a prevailing party other than the United States fees and other expenses incurred by that party unless that adjudicative officer finds that the agency's position was substantially justified or that special circumstances make an award unjust.

The Senate bill also requires a party seeking an award of fees and other expenses to submit an application for them within thirty days of final disposition of the adjudication, including a showing of eligibility and an itemized statement of the amount claimed.

The Senate bill further provides that the amount of any award may be reduced, or eliminated, to the extent that the prevailing party unduly unreasonably protracted final resolution of the matter in controversy.

The House bill contains no comparable provision, but the Senate provision is virtually identical to a provision in S. 265 as reported by the House Judiciary Committee.

The conference substitute adopts the Senate provision.

The conferees direct the United States to pay attorney fees and other expenses to a prevailing party other than the United States in an agency adversarial adjudication unless the position of the government is found to be not substantially justified or where special circumstances make the award unjust. An adversarial adjudication is one in which the agency position is represented by counsel or otherwise. The phrase "prevailing party" is not to be limited to a victor only after entry of a final judgment following a full trial on the merits; its interpretation is to be consistent with the law that has developed under existing statutes.

A party may be deemed prevailing if the party obtains a favorable settlement of his case, *Foster* v. *Boorstin*, 561 F. 2d 340 (D.C. Cir. 1977); if the plaintiff has sought a voluntary dismissal of a groundless complaint, *Corcoran* v. *Columbia Broadcasting System, Inc.*, 121 F. 2d 575 (9th Cir. 1941); or even if the party does not ultimately prevail on all issues, *Bradley* v. *School Board of the City of Richmond*, 416 U.S. 696 (1974).

In cases that are litigated to conclusion, a party may be deemed "prevailing" for purposes of a fee award in a civil action prior to the losing party having exhausted its final appeal. An award may thus be appropriate where the party has prevailed on an interim order which was central to the case, *Parker* v. *Matthews*, 411 F. Supp. 1059, 1064 (D.D.C. 1976), or where an interlocutory appeal is "sufficiently significant and discrete to be treated as a separate unit", *Van Hoomissen* v. *Xerox Corp.*, 503 F. 2d 1131, 1133 (9th Cir. 1974).

After a prevailing party has submitted an application for an award, the burden of proving that a fee award should not be made rests with the Government. The test of whether the Government position is substantially justified is essentially one of reasonableness in law and fact.

Certain types of case dispositions may indicate that the Government action was not substantially justified. A court should look closely at cases, for example, where there has been a judgment on the pleadings or where there is a directed verdict, where a prior suit on the same claim had been dismissed or where there is a substantial difference between the amount or content of the Government's original pleadings and the settlement agreed to. Such cases clearly raise the possibility that the Government was not substantially justified in pursuing the litigation. The amount of this award may be reduced or denied by the adjudicative officer if the party unduly and unreasonably delayed the proceeding.

15. AGENCY ACTIONS—ELIGIBLE FEES AND OTHER EXPENSES

The Senate bill includes as expenses which are to be awarded fees and other expenses for expert witnesses, reasonable costs of any study, analysis, engineering report, test, or project found necessary for the preparation of the party's case and reasonable attorney or agent fees, generally less than $75 per hour.

The House bill contains no comparable provision, but the Senate provision is identical to a provision in S. 265 as reported by the House Judiciary Committee.

The conference substitute adopts the Senate provision.

16. AGENCY ACTIONS—THOSE ELIGIBLE TO CLAIM

The Senate bill defines prevailing parties eligible for such awards as including individuals and certain entities, except: in the case of individuals, those whose net worth at the initiation of the adversarial proceeding exceeded $1 million; and, in the case of entities, those whose net worth at the initiation of the adversarial proceeding exceeded $5 million or who had more than 500 employees. Charitable tax exempt organizations so designated under 501(c)(3) of the Internal Revenue Code and Agricultural co-ops defined in the Agricultural Marketing Act are exempt from the monetary ceiling.

The House bill contains no comparable provision, but the Senate provision is identical to a provision in S. 265 as reported by the House Judiciary Committee.

The conference substitute adopts the Senate provision.

17. AGENCY ACTIONS—ADVERSARY ADJUDICATION

The Senate bill defines adversary adjudication as one where the agency takes a position through representation by counsel or otherwise excluding agency activity such as establishing or fixing a rate or granting or renewing a license.

The House bill contains no comparable provision, but the Senate provision is identical to a provision in S. 265 as reported by the House Judiciary Committee.

The conference substitute adopts the Senate provision.

The conference substitute defines adversary adjudication as an agency adjudication defined under the Administrative Procedures Act where the agency takes a position through representation by counsel or otherwise. It is intended that this definition precludes an award in a situation where an agency, e.g., the Social Security Administration, does not take a position in the adjudication. If, however, the agency does take a position at some point in the adjudication, the adjudication would then become adversarial.

18. AGENCY ACTIONS—ADJUDICATIVE OFFICER

The Senate bill defines an adjudicative officer as the deciding official, whether designated as an administrative law judge, a hearing officer, examiner or otherwise, who presided at the adjudication.

The House bill contains no comparable provision, but the Senate provision is identical to a provision in S. 265 as reported by the House Judiciary Committee.

The conference substitute adopts the Senate provision.

19. AGENCY ACTIONS—UNIFORM REGULATIONS

The Senate bill directs that uniform implementing regulations with respect to application by prevailing parties for an award shall be published by each agency after consultation with the Chairman of the Administrative Conference.

The Senate provision further provides that if a court reviews the merits of an adjudication, the award is postponed for consideration by such court; such an award is to be in addition to any award made by the court relating to the court action.

The House bill contains no comparable provision, but the Senate provision is identical to a provision in S. 265 as reported by the House Judiciary Committee.

The conference substitute adopts the Senate provision.

20. AGENCY ACTIONS—APPEAL OF A DENIAL OF FEE AWARD

A party dissatisfied with a fee award or a denial of an award may petition the Federal Court for leave to appeal. If the petition is granted, the court may modify the award only if the failure to make the award, or the calculation of the amount of the award, was an abuse of discretion.

The House bill contains no comparable provision, but the Senate provision is identical to a provision in S. 265 as reported by the House Judiciary Committee.

The conference substitute adopts the Senate provision.

21. AGENCY ACTIONS—SOURCE OF FUNDS FOR AWARDS

The Senate bill authorizes the payment of any fee award from any funds appropriated to any agency and if not paid by the agency then in the same manner as judgments under section 2414 of title 28, United States Code.

The House bill contains no comparable provision, but the Senate provision is identical to a provision in S. 265 as reported by the House Judiciary Committee.

The conference substitute adopts the Senate provision.

The conference substitute directs that funds for an award and fees and other expenses to come first from any funds appropriated to any agency; if not paid by the agency the award shall be paid in the same manner as judgments under section 2414 of title 28, United States Code except that no awards shall be paid from Social Security Trust Funds as created under section 201 of the Social Security Act.

22. AGENCY ACTIONS—AUTHORIZATION

The Senate bill authorizes the appropriation of such sums as may be necessary for fiscal years 1982, 1983 and 1984.

The House bill contains no comparable provision, but the Senate provision is identical to a provision in S. 265 as reported by the House Judiciary Committee.

The conference substitute adopts the Senate provision.

23. AGENCY ACTIONS—REPORTS

The Senate bill directs that reports be made annually by the Chairman of the Administrative Conference, after consultation with the Chief Counsel for Advocacy of the Small Business Administration.

The House bill contains no comparable provision, but the Senate provision is identical to a provision in S. 265 as reported by the House Judiciary Committee.

The conference substitute adopts the Senate provision.

24. AGENCY ACTIONS—SUNSET

The Senate bill repeals the provisions for award of these fees and other expenses three years after the Act becomes effective except for any action pending at that time.

The House bill contains no comparable provision, but the Senate provision is similar to a provision in S. 265 as reported by the House Judiciary Committee.

The conference substitute adopts the Senate provision.

25. AGENCY ACTIONS—CHIEF COUNSEL FOR ADVOCACY

The Senate bill requires the Chief Counsel for Advocacy of the SBA to advise, cooperate with and consult with the Chairman of the Administrative Conference of the United States with respect to the report the Chairman is required to submit annually to the Congress.

The House bill contains no comparable provision.

The conference substitute adopts the Senate provision.

26A. JUDICIAL PROCEEDINGS—COSTS AND EXPENSES OF ATTORNEYS

The Senate bill removes the statutory prohibition against the availability (to private litigants) of the common law exceptions to the "American Rule" in civil actions with the United States.

The House bill contains no comparable provision, but the Senate provision is virtually identical to a provision in S. 265 as reported by the House Judiciary Committee.

The conference substitute adopts the Senate provision.

The conference substitute restates the current law that provides that certain specific costs (e.g. court reporter), but not attorney fees, may be awarded against the United States unless otherwise specifically provided.

Futher, the substitute provision specifically allows for the payment of attorney fees, (in addition to costs as previously listed) to the prevailing party in any civil action with the United States. Current law allows for the payment of such attorney fees pursuant to limited statutory exceptions such as the Freedom of Information Act, the Privacy Act or Civil Rights Acts that expressly make the United States liable. Such statutory exceptions are exceptions to the "American Rule", which makes each party responsible for the payment of his or her own attorney fees. In addition, under current law, the few non-statutory exceptions to the American Rule available for private litigants are, however, not available to private litigants in cases brought by or against the United States. The substitute provision simply removes this statutory prohibition against the few non-statutory exceptions (i.e., the common law) to the "American Rule". Thus, the United States would be liable for attorney fees under the "bad faith" or "common fund" exceptions. Conference substitute provision reflects the belief that, at a minimum, the United States should be held to the same standards in litigating as private parties. As such, it is consistent with the history of §2412 which reflects a strong movement by Congress toward placing the Federal government and civil litigants on a completely equal footing. (See generally, *Natural Resources Defense Council or E.P.A.*, 484 F. 2d 1331 1st Cir. 1973).

26B. JUDICIAL PROCEEDINGS—FEES AND OTHER EXPENSES

The Senate bill requires a Federal Court to award to a prevailing party other than the United States in a civil action involving the United States (except tort actions) fees and other expenses incurred by that party unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

The Senate bill also requires a party seeking an award of fees and other expenses to submit an application for them within thirty days of final judgment, including a showing of eligibility and an itemized statement of the amount claimed.

The Senate bill further provides that the amount of any award may be reduced, or eliminated, to the extent that the prevailing party unduly and unreasonably protracted final resolution of the matter in controversy.

The House bill contains no comparable provision, but the Senate provision is similar to a provision in S. 265 as reported by the House Judiciary Committee.

The conference substitute adopts the Senate provision.

27. JUDICIAL PROCEEDINGS—ELIGIBLE FEES AND OTHER EXPENSES

The Senate bill makes eligible for award to prevailing parties the fees and other expenses of expert witnesses, reasonable costs of any study, analysis, engineering report, test or project found necessary for the preparation of the party's case and reasonable attorney or agent fees, generally less than $75 per hour.

The House bill contains no comparable provision, but the Senate provision is identical to a provision in S. 265 as reported by the House Judiciary Committee.

The conference substitute adopts the Senate provision.

28. JUDICIAL PROCEEDINGS—THOSE ELIGIBLE TO CLAIM

The Senate bill defines prevailing parties eligible for an award to include individuals and certain entities, except: in the case of individuals, those whose net worth at the initiation of the adversarial proceeding exceeded $1 million; and, in the case of entities, those whose net worth at the initiation of the adversarial proceeding exceeded $5 million or who had more than 500 employees. Charitable tax exempt organizations so designated under 501(c)(3) of the Internal Revenue Code and Agricultural co-ops defined in the Agricultural Marketing Act are exempt from the monetary ceiling.

The House bill contains no comparable provision, but the Senate provision is virtually identical to a provision in S. 265 as reported by the House Judiciary Committee.

The conference substitute adopts the Senate provision.

29. JUDICIAL PROCEEDINGS—AWARDS OF COSTS AND FEES OTHERWISE PROHIBITED

The Senate bill allows, upon review of the merits of an adversary adjudication in the court, an award of fees and other expenses to an otherwise eligible prevailing party. Specifically, this section authorizes an award from the court to prevailing parties who are otherwise entitled to fees and other expenses pursuant to section 504(a) but are precluded from actual receipt pursuant to section 504(c)(1) until completion of a court review of the merits. Additionally, the award of fees and other expenses as previously described is authorized to an otherwise eligible prevailing party that appeals to the court under the Contracts Disputes Act of 1978 in which case the fees and other expenses eligible shall be those incurred during both the adversary adjudication and court proceeding.

The House bill contains no comparable provision, but the Senate provision is virtually identical to a provision in S. 265 as reported by the House Judiciary Committee.

The conference substitute adopts the Senate provision.

30. JUDICIAL PROCEEDINGS—SOURCE OF FUNDS FOR AWARDS

The Senate bill authorizes the payment of any fee and other expenses award from any funds appropriated to any agency and if not paid by the agency then in the same manner as judgments under sections 2414 and 2517 of title 28, United States Code.

The House bill contains no comparable provision, but the Senate provision is identical to a provision in S. 265 as reported by the House Judiciary Committee.

The conference substitute adopts the Senate provision.

The conference substitute directs that funds for an award of fees and other expenses to come first from any funds appropriated to any agency; if not paid by the agency the award shall be paid in the same manner as judgments under sections 2414 and 2517 of title 28, United States Code except that no awards shall be paid from Social Security Trust Funds as created under section 201 of the Social Security Act.

31. JUDICIAL PROCEEDINGS—AUTHORIZATION

The Senate bill authorizes the appropration of such sums as may be necessary for fiscal years 1982, 1983 and 1984.

The House bill contains no comparable provision, but the Senate provision is identical to a provision in S. 265 as reported by the House Judiciary Commitee.

The conference substitute adopts the Senate provision.

32. JUDICIAL PROCEEDINGS—REPORTS

The Senate bill requires the Director of the Adminstrative Office of the United States Courts to report annually the number, nature and amount of fee awards, and other relevant information.

The House bill contains no comparable provision, but the Senate provision is identical to a provision in S. 265 as reported by the House Judiciary Committee.

The conference substitute adopts the Senate provision.

33. JUDICIAL PROCEEDINGS—SUNSET

The Senate bill repeals the provisions for the award of these fees and expenses three years after the bill becomes effective except for actions commenced before the date of repeal.

The House bill contains no comparable provision, but the Senate provision is identical to a provision in S. 265 as reported by the House Judiciary Committee.

The conference substitute adopts the Senate provision.

34. EFFECTIVE DATE

The Senate bill makes this Act effective October 1, 1981 and applicable to adversary adjudications or civil actions pending on or commenced after that date.

The House bill contains no comparable provision, but the Senate provision is virtually identical to a provision in S. 265 as reported by the House Judiciary Committee.

The conference substitute adopts the Senate provision.

35. PILOT EXPORT PROMOTION CENTERS

The Senate bill requires the Secretary of Commerce to establish an export promotion center in each of two district offices on the International Trade Administration of the Department of Commerce. Each of these centers would serve as a one-stop information center on Federal export assistance, financing programs available to small business, and other provisions of law governing exporting for small business. The Export-Import Bank, the Internal Revenue Service, the Overseas Private Investment Corporation, the Department of Commerce, and SBA each would provide one full-time employee to staff the center.

The Senate bill also requires the Secretary of Commerce to report to Congress in six months on the implementation of the above provisions and to evaluate and report to Congress in two years on these centers.

These provisions are sunset on October 1, 1983.

The House bill contains no comparable provisions.

The conference substitute adopts the Senate provision.

36. GRANTS FOR AN INTERNATIONAL MARKETING PROGRAM

The Senate will authorizes the Secretary of Commerce to make grants to encourage the development and implementation of small business International Marketing Programs. Applicants could receive a maximum Federal grant of $150,000 annually for up to three years and would be required to provide matching funds. Grant applicants would be required to have an advisory board of nine members appointed by the director of the program, of which at least five members would be small business persons or representatives of small business associations.

The Secretary of Commerce would be required to establish at least one such program in each region of the Department of Commerce and $1.5 million would be authorized for each of fiscal years 1981 through 1983 to carry out the program.

The Secretary of Commerce would evaluate these programs and report to Congress by October 1, 1982.

The House bill contains no comparable provision.

The conference substitute adopts the Senate provision.

37. ITA CLEARINGHOUSE

The Senate bill requires the Secretary of Commerce, through the International Trade Administration, to maintain a central clearinghouse to provide for the collection, dissemination, and exchange of information between the export promotion centers, the small business International Marketing Programs and the Office of International Trade in the Small Business Administration, and other interested concerns.

The House bill contains no comparable provision.

The conference substitute adopts the Senate provision.

38. EFFECTIVE DATE OF ACT

The House bill is effective October 1, 1980.

The Senate bill is effective upon enactment except that various provisions are specifically made effective on October 1, 1980.

The conference substitute adopts the Senate provisions.

NEAL SMITH,
FERNAND J. ST GERMAIN,
JOHN J. LAFALCE,
JAMES C. CORMAN,
JOSEPH P. ADDABBO,
PARREN J. MITCHELL,
ANDY IRELAND,
IKE SKELTON,
JOE MCDADE,
DOUGLAS BEREUTER,
ARLEN ERDAHL,
JOHN PORTER,

As additional conferees solely for consideration of title III of the Senate amendment:

CLEMENT J. ZABLOCKI,
JONATHAN B. BINGHAM,
ROBERT J. LAGOMARSINO,
Managers on the Part of the House.

GAYLORD NELSON,
ROBERT MORGAN,
CARL LEVIN,
LOWELL WEICKER,
ORRIN G. HATCH,

As additional conferees solely for consideration of title II of the Senate amendment:

DENNIS DECONCINI,
ROBERT DOLE,
Managers on the Part of the Senate.

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Calendar No. 267

96th Congress } SENATE { Report
1st Session } { No. 96-253

EQUAL ACCESS TO JUSTICE ACT

July 20 (legislative day, June 21), 1979.—Ordered to be printed

Mr. DeConcini, from the Committee on the Judiciary,
submitted the following

REPORT

[To accompany S. 265]

The Committee on the Judiciary, to which was referred the bill (S. 265) to provide for equal access to justice, having considered the same, reports favorably thereon with amendments and recommends that the bill, as amended, do pass.

Purpose of the Bill

The bill rests on the premise that certain individuals, partnerships, corporations and labor and other organizations may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights. The economic deterrents to contesting governmental action are magnified in these cases by the disparity between the resources and expertise of these individuals and their government. The purpose of the bill is to reduce the deterrents and the disparity by entitling certain prevailing parties to recover an award of attorney fees, expert witness fees and other costs against the United States, unless the Government action was substantially justified. Additionally, the bill ensures that the United States will be subject to the common law and statutory exceptions to the American rule regarding attorney fees. This change will allow a court in its discretion to award fees against the United States to the same extent it may presently award such fees against private parties.

Background

Legislation providing for the shifting of attorney fees in various situations has been under congressional evaluation for some time. Comprehensive hearings on the subject of attorney fees were held by

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the Senate in the 93d Congress (see Senate Committee on the Judiciary, Subcommittee on Representation of Citizen Interests, The Effect of Legal Fees on the Adequacy of Representation, Hearings, 93d Cong., 1st sess., Sept. 19, 20, and Oct. 1, 2, 4, 5, 1973) and by the House in the 94th Congress (see House Committee on the Judiciary, Subcommittee on Courts, Civil Liberties, and the Administration of Justice, Awarding of Attorneys Fees, Hearings, 94th Cong., 1st sess., Oct. 6, 8, and Dec. 3, 1975).

On March 15, 1977, Senator Pete V. Domenici introduced S. 1001, the predecessor to S. 265 in the 95th Congress, which was referred to the Committee on the Judiciary. On October 12, 1977, Senator Domenici offered the substance of S. 1001 on the floor of the Senate as an unprinted amendment to the Legal Services Corporation Act. A motion to table was defeated by a 55–36 vote and the floor managers of the Legal Services bill accepted the amendment. Also at that time, Senator Dennis DeConcini, as chairman of the Subcommittee on Improvements in Judicial Machinery, agreed to hold hearings on S. 1001. Subsequently, the Domenici amendment to the Legal Services bill was rejected as nongermane by the House of Representatives in conference.

On December 15, 1977, Senator Domenici and Senator Gaylord Nelson introduced S. 2354 which was identical to S. 1001 except that it excluded actions in tort from the scope of its coverage. The Subcommittee on Improvements in Judicial Machinery held a hearing on S. 2354 on March 13, 1978. (See also, House Committee on the Judiciary, Subcommittee on Courts, Civil Liberties, and the Administration of Justice, The Awarding of Attorneys Fees in Federal Courts. Hearings, 95th Congress, 1st and 2d sessions, Nov. 16 and 17, 1977, Apr. 26 and 27, 1978.) At the hearing, Paul Nejelski, testifying for the Department of Justice, criticized the potential cost of the bill. Reliable data was admittedly scarce; however, the Department of Justice estimated that the cost could run as high as $500 million per year. Nejelski further testified that a mandatory award would have a "chilling effect" on proper Government enforcement efforts.

Because of these criticisms, ways were sought to refine S. 2354. In April 1978, the Department of Justice presented the Subcommittee on Improvements in Judicial Machinery with a draft proposal which allowed for an award of fees to prevailing parties where the governmental action was "arbitrary, frivolous, unreasonable, or groundless, or [where] the United States continued to litigate after it clearly became so." The language was taken from *Christiansburg Garment Co.* v. *E.E.O.C.* 434 U.S. 412, 422 (1978), in which the Supreme Court applied the standard to an award of fees to a prevailing defendant in a suit charging racial discrimination under title VII of the Civil Rights Act of 1964.

Although the Department of Justice draft represented a significant improvement on S. 2354 in most respects, the *Christiansburg* standard was too restrictive to serve the purposes of S. 2354. Placing the burden on the prevailing party to prove that the Government action is "arbitrary, frivolous, unreasonable or groundless" makes awards difficult to obtain, particularly in agency proceedings. And where fees are so difficult to recover, the deterrent effect created by the cost of vindicating rights vis-a-vis the Government would not be lessened.

The subcommittee therefore approved an amendment in the nature of a substitute to S. 2354 which adopted the language, the structure, and most of the substance of the Department of Justice proposal but which substituted a standard which would allow prevailing parties to recover fees "unless * * * the position of the United States was substantially justified or * * * special circumstances make an award unjust." This standard represented an acceptable middle ground between the mandatory award required by S. 2354 as originally drafted and the restrictive standard adopted in the Department of Justice draft proposal. The amendment in the nature of a substitute to S. 2354 was reported favorably by unanimous vote of the members of the Subcommittee on Improvements in Judicial Machinery. However, no further action was taken by the Judiciary Committee in the 95th Congress.

On January 31, 1979, Senators Domenici, Nelson and DeConcini introduced S. 265, the Equal Access to Justice Act, which reflected the substance of S. 2354 as reported by the Subcommittee on Improvements in Judicial Machinery in the 95th Congress. Additional hearings were held on April 19, 20, and 21, 1979. On May 24, 1979, the subcommittee by unanimous vote reported an amended bill for consideration by the Committee on the Judiciary.

On July 17, 1979, the Committee on the Judiciary undertook consideration of S. 265. At that time, the committee made several technical and clarifying amendments to the bill. The major substantive changes included the exclusion of ratemaking and license application proceedings and the elimination of an exclusion of tax cases. Under the bill as reported, tax cases will be covered by the same standard which governs awards of attorney fees in other civil litigation with the United States, i.e., awards will be made unless the Government action was substantially justified. (See section 4, creating a new subsection 2412(d) of title 28, United States Code.) A further committee amendment requires that fee awards be taken from the budgets of the agencies or departments whose actions have been found not substantially justified. S. 265, as amended, was ordered favorably reported, without objection.

STATEMENT

Under present law in the United States, each party is responsible for the payment of his own attorney fees and other expenses incurred during litigation. The "American rule," however, has both common law and statutory exceptions.

The courts have inherent equitable power to award fees when overriding considerations of justice so demand. The courts traditionally have used this power under two well-recognized exceptions to the American rule. The "bad faith" exception allows an award where the losing party has willfully disobeyed a court order or has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. Under the "common fund" or "common benefit" exception, a court may award fees to a party whose legal action creates or preserves a fund of money or other assets for the benefit of others as well as himself.

The exception also applies where substantial nonpecuniary benefits are protected, even though the suit actually brings no money into the court. The fees are recovered either from the fund or from the other parties enjoying the benefits of the legal action.

The American rule is also subject to numerous statutory exceptions. Congress has authorized the recovery fees in a variety of contexts, usually to effectuate a specific and compelling public interest. Among the recent enactments are titles II and VII of the Civil Rights Act of 1964 [42 U.S.C. sections 2000a-3(b); 2000e-5(k)]; title VIII of the Civil Rights Act of 1968 [42 U.S.C. 3612(c)]; title III of the Organized Crime Control Act (18 U.S.C., section 2520); the Freedom of Information Act (5 U.S.C. 552(a)(4)(E)); the Voting Rights Act of 1975, as amended [42 U.S.C. 19731(e)]; the Consumer Product Safety Act (15 U.S.C. sections 2059(e)(4), 2060, 2072(a), 2073); and most recently, the Civil Rights Attorneys Fees Awards Act of 1976 (42 U.S.C. section 1988).

In the case of civil actions brought by or against the United States, the American rule prohibiting fee-shifting is itself statutory. Section 2412 of title 28, United States Code, provides that costs, but not attorney fees, may be awarded against the United States. The section is subject only to statutory exceptions such as the Freedom of Information Act, Privacy Act and the Civil Rights Acts which specifically authorize awards against the United States, and not to the common law exceptions or to other statutory exceptions which do not expressly make the United States liable.

Senate bill 265 makes two changes in present law. First, it amends 28 U.S.C. 2412 to permit a court in its discretion to award attorney fees and other expenses to prevailing parties in civil litigation involving the United States to the same extent it may award fees in cases involving private parties. Thus, the United States would be liable for fees under the "bad faith," "common fund," and "common benefit" exceptions to the American rule. Fees may also be recovered against the United States under rule 37, Federal Rules of Civil Procedure, which provides for sanctions for failure to make discovery and under the terms of any Federal statute which authorizes awards against private parties unless the statute expressly provides otherwise. There appears to be no justification for exempting the United States in these situations; the change simply reflects the belief that, at a minimum, the United States should be held to the same standards in litigating as private parties. As such, it is consistent with the history of § 2412 which reflects a strong movement by Congress toward placing the Federal Government and civil litigants on a completely equal footing. (See generally, *Natural Resources Defense Council* v. *E.P.A.*, 484 F. 2d 1331 (1st Cir. 1973).)

The bill makes a second significant change in the existing law regarding attorney fees by establishing a general statutory exception for an award of fees against the Government. Under this exception certain parties who prevail in administrative adjudications or civil actions brought by or against the United States will be entitled to attorney fees and related costs unless the Government action was substantially justified. This change is effectuated by adding a new section to title 5 and by substantially amending section 2412 of title 28. Parties eligible to recover fees under these new sections include individuals whose net worth is less than $1 million and sole owners of unincorporated businesses, partnerships, corporations, associations, or other organizations whose net worth is less than $5 million. The standards governing fee awards under this exception are explained in more detail below.

EXPLANATION OF THE BILL

A. PURPOSE AND POLICY

The American rule is grounded in the belief that a losing party should not be penalized for merely exercising his or her right to prosecute or defend a lawsuit. Thus, one of the stated purposes of the American rule is not to discourage or deter litigation. However, in many cases, particularly in litigation with the Government, the American rule is in fact having the opposite effect. For many citizens, the costs of securing vindication of their rights and the inability to recover attorney fees preclude resort to the adjudicatory process. See *Stanford Daily* v. *Zurcher*, 366 F. Supp. 18 (N.D. Calif. 1973). When the cost of contesting a Government order, for example, exceeds the amount at stake, a party has no realistic choice and no effective remedy. In these cases, it is more practical to endure an injustice than to contest it.

The deterrent effect created by this inability to recover fees against the Government is particularly disturbing in light of the rapid growth in Government regulations in recent years. While the influence of the bureaucracy over all aspects of life has increased, the ability of most citizens to contest any unreasonable exercise of authority has decreased. Thus, at the persent time, the Government with its greater resources and expertise can in effect coerce compliance with its position. Where compliance is coerced, precedent may be established on the basis of an uncontested order rather than the thoughtful presentation and consideration of opposing views. In fact, there is evidence that small businesses are the target of agency action precisely because they do not have the resources to fully litigate the issue.[1] This kind of truncated justice undermines the integrity of the decision-making process.

The exception created by S. 265 focuses primarily on those individuals for whom cost may be a deterrent to vindicating their rights. The bill rests on the premise that a party who chooses to litigate an issue against the Government is not only representing his or her own vested interest but is also refining and formulating public policy. An adjudication or civil action provides a concrete, adversarial test of Government regulation and thereby insures the legitimacy and fairness of the law. An adjudication, for example, may show that the policy or factual foundation underlying an agency rule is erroneous or inaccurate, or it may provide a vehicle for developing or announcing more precise rules. The bill thus recognizes that the expense of correcting error on the part of the Government should not rest wholly on the party whose willingness to litigate or adjudicate has helped to define the limits of Federal authority. Where parties are serving a public purpose, it is unfair to ask them to finance through their tax dollars unreasonable Government action and also bear the costs of vindicating their rights.

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[1] Dr. F. M. Scherer, former Director of the Bureau of Economics of the FTC, testifying at hearings on the Robinson-Patman Act before the House Small Business Committee in 1976 stated:

> I had not fully realized until I came to Washington how unfairly the burden of Federal regulation and antitrust enforcement falls upon small business as compared to large companies. The corporate giants can and do maintain stables of high-skilled attorneys to advise them how to stay clear of the law and defend themselves if they nevertheless run afoul. Small firms are less able to afford such counsel, and the law firms they retain typically lack the specialized knowledge needed to cope with a body of statutory, case and regulatory law as complex as Robinson-Patman. As a result, they are more likely to get into trouble and to settle by consent if a complaint is brought * * *.
>
> I had also understood little about the value system of government antitrust attorneys. What I learned since joining the Commission staff is that many attorneys measure their own success in terms of the number of complaints brought and settlements won. In the absence of broader policy guidance, therefore, the typical attorney shies away from a complex, long, uncertain legal contest with well-represented giant corporations and tries to build up a portfolio emphasizing small, easy-to-win cases. The net results of these broad propensities is that it is the little guys, not the giants that dominate our manufacturing and trade industries, who typically get sued. (Quoted by John Williams, Small Business Legislative Council, in Hearing on S. 2354, Equal Access to Courts, Mar. 13, 1978.)

B. THE STANDARD

Under S. 265, fees will be awarded unless the Government can show that its action was substantially justified or that special circumstances make an award unjust. This standard balances the constitutional obligation of the executive branch to see that the laws are faithfully executed against the public interest in encouraging parties to vindicate their rights. Unlike the dual standards under the Civil Rights Acts developed in *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968) (prevailing plaintiffs should ordinarily recover their attorneys fees unless special circumstances would render an award unjust) and in *Christiansburg Garment Co.* v. *Equal Employment Opportunity Commission*, 434 U.S. 412, 421 (1978) (prevailing defendants should recover fees only upon a finding that a plaintiff's action was frivolous, unreasonable or without foundation), the standard in S. 265 is tailored to cover both prevailing plaintiffs and prevailing defendants in general litigation against the Government. The *Piggie Park* standard is inappropriate in this context because it might have a chilling effect on reasonable Government enforcement efforts. On the other hand, the *Christiansburg Garment* standard is inadequate because it simply would not overcome the strong disincentives to the exercise of legal rights which now exist in litigation with the Government.

The test of whether or not a Government action is substantially justified is essentially one of reasonableness. Where the Government can show that its case had a reasonable basis both in law and fact, no award will be made. In this regard, the strong deterrents to contesting Government action require that the burden of proof rest with the Government. This allocation of the burden, in fact, reflects a general tendency to place the burden of proof on the party who has readier access to and knowledge of the facts in question. The committee believes that it is far easier for the Government, which has control of the evidence, to prove the reasonableness of its action than it is for a private party to marshal the facts to prove that the Government was unreasonable.

Certain types of case dispositions may indicate that the Government action was not substantially justified. A court should look closely at cases, for example, where there has been a judgment on the pleadings or where there is a directed verdict or where a prior suit on the same claim had been dismissed. Such cases clearly raise the possibility that the Government was unreasonable in pursuing the litigation.

The standard, however, should not be read to raise a presumption that the Government position was not substantially justified, simply because it lost the case. Nor, in fact, does the standard require the Government to establish that its decision to litigate was based on a substantial probability of prevailing. Furthermore, the Government should not be held liable where "special circumstances would make an aware unjust." This "safety valve" helps to insure that the Government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts. It also gives the court discretion to deny awards where equitable considerations dictate an award should not be made.

C. PREVAILING PARTY

Under existing fee-shifting statutes, the definition of prevailing party has been the subject of litigation. It is the committee's intention that the interpretation of the term in S. 265 be consistent with the law that has developed under existing statutes. Thus, the phrase "prevailing party" should not be limited to a victor only after entry of a final judgment following a full trial on the merits. A party may be deemed prevailing if he obtains a favorable settlement of his case, *Foster* v. *Boorstin*, 561 F. 2d 340 (D.C. Cir. 1977); if the plaintiff has sought a voluntary dismissal of a groundless complaint, *Corcoran* v. *Columbia Broadcasting System, Inc.*, 121 F. 2d 575 (9th Cir. 1941); or even if he does not ultimately prevail on all issues, *Bradley* v. *School Board of the City of Richmond*, 416 U.S. 696 (1974).

In cases that are litigated to conclusion, a party may be deemed "prevailing" for purposes of a fee award in a civil action prior to the losing party having exhausted its final appeal. A fee award may thus be appropriate where the party has prevailed on an interim order which was central to the case, *Parker* v. *Matthews*, 411 F. Supp. 1059, 1064 (D.D.C. 1976), or where an interlocutory appeal is "sufficiently significant and discrete to be treated as a separate unit", *Van Hoomissen* v. *Xerox Corp.*, 503 F. 2d 1131, 1133 (9th Cir. 1974).

CONCLUSION

Providing an award of fees to a prevailing party represents one way to improve citizen access to courts and administrative proceedings. When there is an opportunity to recover costs, a party does not have to choose between acquiescing to an unreasonable Government order or prevailing to his financial detriment. Thus, by allowing an award of reasonable fees and expenses against the Government when its action is not substantially justified, S. 265 provides individuals an effective legal or administrative remedy where none now exists. By allowing a decision to contest Government action to be based on the merits of the case rather than the cost of litigating, S. 265 helps assure that administrative decisions reflect informed deliberation. In so doing, fee-shifting becomes an instrument for curbing excessive regulation and the unreasonable exercise of Government authority.

In this context, the committee believes that S. 265 serves the public interest and justifies an exception to the American rule that each party must bear his own costs in litigation. This is particularly so since the general statutory exception for awards against the United States represents a limited experiment. The bill has a sunset provision which repeals the relevant amendments to titles 5 and 28 at the end of 3 years. At that time, it is expected that the cost and impact of the legislation will be reviewed.

RECORD VOTES IN COMMITTEE

On July 17, 1979, the Committee on the Judiciary met in open executive session at which time it considered S. 265, the Equal Access to Justice Act. The only record vote occurred on Senator Cochran's amendment to change the language governing the award of fees from "substantially justified" to "reasonably justified". On a motion to adopt the Cochran amendment:

YEAS	NAYS
Bayh	Culver
Baucus*	DeConcini
Heflin	Leahy
Mathias	Thurmond
Dole	Hatch*
Cochran	Simpson*
	Kennedy

An amendment by Senator Kennedy to restore the $75 an hour maximum attorney fee which had been eliminated in subcommittee and several technical amendments were accepted. The Committee then ordered S. 265, as amended, favorably reported, without objection.

(*By proxy.)

CONGRESSIONAL BUDGET OFFICE
U.S. CONGRESS
WASHINGTON, D.C. 20515

Alice M. Rivlin
Director

July 18, 1979

The Honorable Edward M. Kennedy
Chairman
Committee on the Judiciary
United States Senate
2226 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has prepared the attached cost estimate for S. 265, the Equal Access to Justice Act.

Should the Committee so desire, we would be pleased to provide further details on this estimate.

Sincerely,

Alice M. Rivlin
Director

cc: The Honorable Strom Thurmond
Ranking Minority Member

CONGRESSIONAL BUDGET OFFICE

COST ESTIMATE

July 18, 1979

1. BILL NUMBER: S. 265

2. BILL TITLE: Equal Access to Justice Act

3. BILL STATUS:

   As ordered reported by the Senate Committee on the Judiciary, July 17, 1979.

4. BILL PURPOSE:

   The purpose of this legislation is to provide for an award of attorney fees, expert witness fees, and other costs to certain parties who prevail in a review of, or in defending against, government actions in certain administrative adjudications and civil actions. The prevailing party is entitled to these awards only if the government does not show that its action was substantially justified. The legislation expires three years after enactment.

5. COST ESTIMATE: (by fiscal years, in millions of dollars)

	1980	1981	1982	1983	1984
Estimated Costs	108	122	137	---	---

6. BASIS OF ESTIMATE:

   The following presents the methodology used to estimate the cost of this legislation. For the purpose of this estimate, an effective date of October 1, 1979 has been assumed.

   Case Loads
   A key determinant of the potential costs of this legislation is the total number of cases affected by the bill. These cases would be those that the government would lose and for which it could not or would not show substantial justification for prosecuting. As mandated by the bill, tort and Tax Court cases have been excluded. The bill also excludes from coverage individuals having a net worth of $1 million or more, and any sole owner of an unincorporated business, or any partnerships, corporations, associations, or organizations having a net worth of $5 million or more. No estimate is available of the proportion of cases so excluded. Also excluded were those cases for which fees and other costs are already authorized, such as Freedom of Information Act and Title VII cases. In fiscal year 1978, the number of applicable cases terminated involving the federal government in the district, claims, customs, tax and appeals courts was approximately 60,730, (2,960 tax cases and 57,770 other types of civil cases). It was assumed that the government would lose 15 percent of

the tax cases and 20 percent of all other cases. These assumptions are based on a Justice Department survey which indicated that in fiscal years 1976 and 1977, the government lost an average of 15 to 25 percent of its cases. It was then assumed that the government could not or would not attempt to show a substantial justification for prosecuting in 25 percent of the cases lost. (In some cases, the cost in both time and dollars of such a justification may result in a Justice Department decision not to contest the awarding of fees, even when substantial justification may exist.) Therefore, the base number of cases for which an award of attorney fees and other costs is made was assumed to be approximately 3,000 cases per year, or less than 5 percent of the relevant judicial proceedings involving the government. Data from the Justice Department indicate that case loads have increased in the past at a rate of approximately 6 percent per year. This rate of increase has been applied to the 1978 base case load in projecting the number of cases affected by the bill.

The methodology used to estimate the number of administrative adjudications for which awards would be made was similar to that for judicial proceedings. A 1975 report of the Administrative Conference of the United States showed that a total of 116,088 cases were terminated in 1975 after review by an administrative law judge. However, this figure, in addition to being outdated, does not include all cases in the Department of the Interior. For purposes of this cost estimate, a base case-load figure of 120,000 was used. Employing the same loss rate (20 percent) and award rate (25 percent) as was used for judicial proceedings, it was estimated that awards would be made for approximately 6,000 administrative cases, again increased by 6 percent per year over the projection period.

Awards

The estimated average award for judicial proceedings, excluding tax cases, was based on two surveys of awards in cases involving Title VII actions, Freedom of Information and Privacy Act litigations in 1977. The average award in these cases was approximately $16,000 for attorney fees. This amount was assumed to apply to all of the judicial cases estimated above, except tax cases. In addition to attorney fees, it was assumed that an award would be made for other costs incurred, such as expert witness fees, costs of studies or reports, and any other costs deemed necessary for the support of the case. This additional amount was assumed to be $2,000, increased each year by the CBO projection of the consumer price index (CPI). Average awards in tax cases were estimated to be $10,000 for cases in the District Court, and $25,000 in the Court of Claims and the Appeals Court, also increased by the projection of the CPI. The total cost for all judicial proceedings was therefore estimated to be approximately $61 million in fiscal year 1980, increasing to $71 million in fiscal year 1982.

The awards for administrative adjudications for all types of cases were estimated to be $5,000 on average for attorney's fees and $1,000 for other costs. Other costs were assumed to increase annually by the CBO projection of the increase in the CPI. The total cost for administrative adjudications was estimated to be $42 million in fiscal year 1980, increasing to $48 million in fiscal year 1982, based on historical case-load levels.

Additional Impact of Bill

The costs derived above were increased by 5 percent in 1980, 10 percent in 1981, and 15 percent in 1982, to reflect the impact that enactment of this bill would have on the size of awards and the number of cases. This was done for two reasons. First, since the government must show substantial justification for its actions, more time and money is expected to be spent by the government and private attorneys in establishing whether an award will be made. Second, since the bill states that "it is the purpose of this Act to diminish the deterrent effect of seeking review of, or defending against, governmental action...", case loads in both judicial and administrative proceedings are expected to increase faster than the historical rate by virtue of the existence of this legislation.

7. ESTIMATE COMPARISON:

No estimates from other sources are currently available on the cost of the bill as ordered reported by the Committee. However, estimates were made of the bill as introduced. The major change in the legislation since that time affecting cost is the inclusion of tax cases (except those in the Tax Court).

For its recent March 15th report to the Budget Committee, the Senate Judiciary Committee estimated that the total cost of this legislation, as introduced, would be between $16.0 and $36.0 million annually for fiscal years 1980-1982. The Committee's estimate was based on a 1977 case-load figure of 43,000 (excluding tax), as compared to 60,730 for 1978 which the CBO estimate used (including tax cases). The Judiciary Committee assumed a government loss rate of 15 to 25 percent, and assumed that awards would be made in only 10 to 15 percent of the cases the government loses. The average amount of each award for attorney fees was assumed to be $16,000 in both the CBO and Committee estimates; however, the Judiciary Committee did not include any additional amount for other costs. The Committee's total cost for judicial proceedings was $10.7 to $24 million, as compared to the CBO estimate of $64.6 million. Awards for administrative adjudications were estimated by the Committee to be only half that of judicial proceedings, or between $5.3 and $12 million.

On April 10, 1979, the Department of Justice testified that the cost of S. 265, as introduced, would be approximately $125 million annually. In this estimate, the Justice Department used a 1978 case-load of 54,000 for judicial proceedings, excluding tax cases. The Department assumed that the government would lose 15-25 percent of its cases, and that attorney fees of $16,000 would be awarded in 25 percent of the cases the government lost. These assumptions are essentially the same as were used in the CBO estimate, excluding other costs. Administrative adjudication costs were estimated to be at least as much as judicial proceedings.

8. PREVIOUS CBO ESTIMATE:

On April 20, 1979, CBO estimated that the cost of S. 265, as introduced, would be $106 million in fiscal year 1980, increasing to $134 million in fiscal year 1982. The increase in the current estimate resulted from the inclusion of tax cases, except those in the Tax Court.

9. ESTIMATE PREPARED BY: Kathy Weiss (225-7760) kw

10. ESTIMATE APPROVED BY:

for James L. Blum
Assistant Director
for Budget Analysis

REGULATORY IMPACT STATEMENT

In compliance with paragraph 5, Rule XXIX of the Standing Rules of the Senate, the Committee finds that no significant increase in the costs of regulation or in paperwork will result from the enactment of S. 265.

The bill provides for awards of attorney fees to private parties who prevail in agency adjudications or civil actions brought by or against the United States unless the government can show that its actions were substantially justified. The only additional recordkeeping required by S. 265 relates to annual reports on the amount of fees awarded in agency adjudications and civil actions which are to be submitted by the Administrative Conference and the Administrative Office of the United States Courts respectively. These reports are necessary in order to provide reliable data regarding the fiscal impact of the legislation and to provide a record of which agencies or departments are engaging in the unreasonable exercise of government authority.

The Committee thus anticipates that the award of fees where government action is not substantially justified will curb excessive regulation and will, in fact, reduce the regulatory impact as defined in paragraph 5 of Rule XXIX.

SECTION-BY-SECTION ANALYSIS OF S. 265, THE EQUAL ACCESS TO JUSTICE ACT

SECTION 1

Section 1 provides that the bill may be cited as the "Equal Access to Justice Act."

SECTION 2

Section 2 contains a statement of the Congressional findings on which the bill is based and the purposes for which it is intended.

SECTION 3

Section 3(a) amends chapter 5 of title 5, United States Code, by adding a new section, § 504, which provides for an award of reasonable fees and expenses to prevailing parties in agency adjudications under section 554 of title 5.

Under section 504(a), a party other than the United States who prevails in an agency adjudication is entitled to reasonable fees and other expenses unless the agency finds the position of the agency as a party to the proceedings was substantially justified or that special circumstances make an award unjust. The language used in this section is identical to language presently found in Rule 37, Federal Rules of Civil Procedure. Its effect is to place the burden on the government to make a positive showing that its position and actions during the course of the proceedings were substantially justified or that some other circumstance makes an award unjust. The test of whether or not a government action is substantially justified is essentially one of reasonableness. In order to defeat an award, the government must show that its case had a reasonable basis in law and fact. Absent such a showing, fees should be awarded. The section identifies one circumstance which may defeat or reduce an award -- the actions of the prevailing party in unreasonably protracting the resolution of the controversy. The section further requires that the fee determination include specific written findings and conclusions which will be made a part of the record and which may be subject to judicial review under section 504(c).

Alternative standards were considered. For example, S. 2354, the predecessor to S. 265 in the 95th Congress, allowed for automatic awards to prevailing parties. This mandatory award was rejected because it did not account for the reasonable and legitimate exercise of governmental functions and thus might have a chilling effect on proper government enforcement efforts. A purely discretionary standard such as may be found in some existing federal fee-shifting statutes [See, e.g., 15 U.S.C. 2059 (e)(4); 33 U.S.C. 1365(d); 42 U.S.C. 1973(e)] was also considered. A discretionary standard, however, fails to account for the natural reluctance of agencies to award fees against themselves and also offers little direction to the exercise of agency discretion. The Department of Justice proposed standard, on the other hand, gives some definition and some guidance, but is unnecessarily restrictive. Under the Department's proposal, fees would be awarded only where the government action was "arbitrary, frivolous, unreasonable, or groundless, or the United States continued to litigate after it clearly became so." [See, *Christiansburg Garment Co. v. E.E.O.C.*, 434 U.S. 412,417 (1978)]. In order to recover fees under this standard, a party must first prevail and then must marshal the facts to prove that the government action was arbitrary or frivolous. Placing this heavy burden on the prevailing party makes awards difficult to obtain, particularly in agency proceedings. And where fees are so difficult to recover, the deterrent effect created by the cost of vindicating rights vis-a-vis the government would not be lessened.

The standard and burden of proof adopted in S. 265 represents an acceptable middle ground between an automatic award of fees and the restrictive standard proposed by the Department of Justice. It presses the agency to address the problems of abusive and harassing regulatory practices. It is intended to caution agencies to carefully evaluate their cases and not to pursue those which are weak or tenuous. At the same time, the language of the section protects the government when its case, though not prevailing, has a reasonable basis in law and fact. Furthermore, it provides a safety valve where unusual circumstances dictate that the government should not be held liable, as for example when the government is advancing in good faith a credible, though novel, rule of law.

The section covers only adjudications under 554 of title 5 and not rulemaking or other administrative proceedings. In part, the decision to

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award fees only in agency adjudications reflects a desire to narrow the scope of the bill in order to make its costs acceptable. It also reflects a desire to limit the award of fees to situations where participants have a concrete interest at stake but nevertheless may be deterred from asserting or defending that interest because of the time and expense involved in pursuing administrative remedies. In these situations, in order to insure that individuals will actively seek to protect their rights vis-a-vis the government, they must have the opportunity to recover the costs of litigating. An administrative remedy in these circumstances cannot be truly effective unless a prevailing party is made whole.

Section 504(b) defines terms used in the section. The "fees and other expenses" which may be recovered under this section include the reasonable fees of attorneys and expert witnesses as well as the reasonable cost of any report, study or test which is necessary to the party's case. An "agent fee" may be awarded for the services of a non-attorney where an agency permits such agents to represent parties who come before it.

The definition establishes that fees are to be based on the prevailing market rate for the kind and quality of services rendered. However, no attorney may be compensated at a rate in excess of $75 per hour unless special factors justify a higher fee. Such factors would include, but are not limited to, an increase in the cost of living or a limited availibility of qualified attorneys with expertise in the particular proceedings involved. The ceiling on attorney fees relates only to the compensation of lawyers themselves. It does not include their overhead expenses or other costs connected with their representation of a particular interest in a proceeding. The Committee also notes that this section is not intended to affect or limit the computation of reasonable attorney fees under any other provision of law authorizing an award of fees for litigation under a particular statute, such as the Civil Rights Acts,designed to promote private enforcement of that Act.

In general, the Committee intends that, consistent with the above limitations, the computation of attorney fees be based on prevailing market rates without reference to the fee arrangements between the attorney and client. The fact that attorneys may be providing services at salaries or hourly rates below the standard commercial rates which attorneys might normally receive for services renderes is not relevant to the computation of compensation under the Act. In short, the award of fees is to be determined according to general professional standards.

The definition of "party" in this subsection identifies those individuals, businesses and organizations which may recover fees and expenses under this section. Those persons eligible to recover fees include individuals whose net worth is less than one million dollars and sole owners of unincorporated businesses, partnerships, corporations and associations or public or private organizations whose net worth is less than five million dollars. The definition thus establishes financial criteria which limit the bill's applications to those persons and small businesses for whom costs may be a deterrent to vindicating their rights. "Net worth" is calculated by subtracting total liabilities from total assets. In determining the value of assets, the cost of acquisition rather than fair market value should be used.

The definition of "adjudication" for the purpose of this section excludes ratemaking and licensing application hearings which are considered adjudication under section 554 of title 5 for other purposes. However, the exclusion does not extend to proceedings under section 554 involving the suspension, annulment, withdrawal, limitation, amendment, modification or conditioning of a license. A party who prevails in the latter circumstances is entitled to an award of attorney fees under the terms of this section.

Section 504(c)(1) directs each agency to establish rules governing the procedure for awarding fees. It is intended that the rules specify that an award will be made unless the government comes forward with a showing that its case was substantially justified. Thus, if no opposing petition is filed, an award should be made. Subsection (c)(1) further specifies that where the underlying adjudication is reviewed by a court, an award shall be made under 28 U.S.C. 2412(d)(3), a new section added by this bill. Under this section, an award by a court may cover the fees and expenses of the administrative adjudication as well as the civil action upon review.

Section 504(c)(2) provides that a party who is dissatisfied with an agency decision regarding attorneys fees (either the failure to award or

Section 504(c)(2) provides that a party who is dissatisfied with an agency decision regarding attorneys fees (either the failure to award or the amount of the award) may petition for leave to appeal to the United States court which would have jurisdiction to review the merits of the underlying decision of the agency adjudication. Review was made discretionary in order to prevent the inundation of the federal courts by routine appeals from fee determinations in agency adjudications. For similar reasons, the denial of a petition for leave to appeal is not reviewable. If a petition is granted, the court may reverse or modify the fee determination if it finds that the agency abused its discretion.

Section 504(d) establishes that awards will be paid out of the budget of the agency whose actions are found not substantially justified, thereby making each agency accountable for its actions. The section also specifies that no additional funds may be appropriated to cover the costs of fee awards. An agency thus must request permission from its authorizing and appropriating committes in Congress to reprogram funds appropriated for other purposes in order to use them for fees and other expenses awarded under this section. The impact of awards on the agency's budget will provide a quantitative measure of agency error which should encourage review of its practices and its regulations.

Section 504(e) directs the Administrative Conference of the United States to report annually regarding the number and amount of fee awards under this section. The report will allow Congress to evaluate the legislation's cost and impact on the regulatory process at the end of three years when it expires. The report may also stimulate Congressional oversight of those agencies which appear to be engaging in unreasonable regulatory activity.

Section 3(b) amends the table of chapters to reflect the addition of section 504.

Section 3(c) is a sunset provision, repealing section 504 of title 5 at the end of three years. The section makes clear, however, that section 504 will continue to apply through final disposition of any adjudication commenced before the date of repeal. The bill is intended to be a limited experiment which will be reviewed and re-evaluated at the end of three years.

SECTION 4

Section 4(a) amends section 2412 of title 28, United States Code, by adding new provisions regarding the award of attorney fees and other expenses in certain judicial proceedings.

Section 2412(a) preserves the law of the existing section 2412 which provides for a discretionary award of costs in any civil action brought by or against the United States. The costs which may be awarded are enumerated in section 1920 of title 28. They include the various fees payable to the court and its officials but they do not include the expense of legal counsel. Certain technical changes are necessitated by the addition of the subsections which follow.

Section 2412(b) permits a court in its discretion to award attorney fees and other expenses to prevailing parties in civil litigation involving the United States to the same extent it may award fees in cases involving private parties. Thus, under this section, cases involving the United States would be subject to the "bad faith", "common fund", and "common benefit" exceptions to the American rule against fee-shifting. The United States would also be liable under Rule 37, Federal Rules of Civil Procedure and under the same standards which govern awards against private praties under federal statutory exceptions, unless the statute expressly provides otherwise.

It has been generally held that existing section 2412 prevents an award of attorney fees against the United States, even under the common law exceptions, in the absence of express statutory authority. The issue, however, continues to be the subject of litigation. See, e.g., Pealo v. Farmers Home Administration of the United States, 562 F.2d. 744 (D.C.Cir. 1977) (reversing lower court's application of "common benefit" exception); Rhode Island Committee on Energy v. General Services Administration, 561 F.2d. 397 (1st Cir. 1977) (refusing to apply "bad faith" exception). This subsection reflects the belief that at a minimum, the United States should be held to the same standard in litigating as private parties and that no justification exists for exempting the United States from fee awards in these limited situations.

Section 2412(c)(1) incorporates language found in existing section 2412 which establishes that judgments for costs are to be paid as provided for in sections 2414 and 2517 of title 28. Section 2412(c)(2) establishes that fees and expenses under subsection (b) are to be paid in the same manner as costs unless the award is based upon a finding that the United States acted in bad faith. In those circumstances, the award is to be paid by the governmental entity found to have acted in bad faith. This fiscal responsibility is intended to make the individual agencies and departments accountable for actions pursued in bad faith. The awards and resulting impact on the budget will provide a concrete basis for evaluating agency error.

Section 2412(d) authorizes an award of reasonable fees and expenses in judicial proceedings analogous to the awards authorized in agency adjudications under section 3 of this bill.

Under subsection 2412(d)(1), a party other than the United States who prevails in certain civil actions brought by or against the United States is entitled to reasonable fees and other expenses unless the government action was substantially justified or other circumstances make an award unjust. The subsection applies to all civil actions except those sounding in tort and those already covered by existing fee-shifting statutes. Tort cases were excluded because the bill's sponsors considered the legal remedies adequate and equitable in those cases. Moreover, this section is not intended to replace or supercede any existing fee-shifting statutes such as the Freedom of Information Act, the Civil Rights Acts, and the Voting Rights Act in which Congress has indicated a specific intent to encourage vigorous enforcement, or to alter the standards or the case law governing those Acts. It is intended to apply only to cases (other than tort cases) where fee awards against the government are not already authorized.

The same standard which is applied in agency adjudications under section 3(a) of this bill, is also applied to fee awards in civil actions under this subsection. Courts are often reluctant to award fees because they have operated so long under the American rule prohibiting fee-shifting. In fact, the reluctance of the courts to award fees prompted the adoption of the language in Rule 37 on which this standard is based. [See Federal Rules of Civil Procedure, Notes of Advisory Committee on Rules, Rule 37, subdivision (a)(4).] Under these circumstances, it is particularly appropriate to place the burden on the government to prove the reasonableness of its actions. To do so encourages parties to contest action which they believe to be unreasonable and thereby serves to refine public policy.

Under Section 2412(d)(1), a party seeking an award of fees must apply to the court within 30 days of final judgment. This language, however, should not be construed to require a final judgment on the merits before a court may award fees. Further, as in the case of agency adjudications, it is intended that if the government does not oppose an application for fees, the award should be granted.

Subsection 2412(d)(2) defines terms which apply to this subsection. The definition of "fees and expenses" and "party" is explained under section 3(a) of this bill. (New section 504(e) of title 5.)

Subsection 2412(d)(3) provides that a court may award fees to a party who prevails upon judicial review of an agency adjudication. In these cases in particular, where a party has had to engage in lengthy administrative proceedings before final vindication of his or her rights in the courts, the government should have to make a strong showing to demonstrate that its action was reasonable.

Subsection 2412(d)(4) establishes that awards under this subsection will be paid by the agency or department whose action are found not substantially justified. This fiscal responsibility is intended to make the individual agencies and department accountable for their actions. The subsection also specifies that no additional funds may be appropriated to cover the costs of fee awards. An agency or department thus must request permission from its authorizing and appropriating committees in Congress to reprogram funds appropriated for other purposes in order to use them for fees and other expenses awarded this subsection.

Subsection 2412(d)(5) directs the Administrative Office of the United States Courts to report annually regarding the number and amount of fee awards under this subsection. The report will allow Congress to evaluate the legislation's cost and impact on agency litigation when it expires at the end of three years. The report may also stimulate Congressional oversight of those agencies or departments which appear to be engaging in unreasonable litigation.

Section 4(b) of the bill conforms the item relating to section 2412 in the table of sections for chapter 161 of title 28.

Section 4(c) is a sunset provision, repealing subsection (d) of section 2412 of title 28 at the end of three years. The section makes clear, however, that subsection (d) will continue to apply through final disposition of any action commenced before the date of repeal. Subsection (d) which parallels the authorization of awards in agency proceedings is likewise intended to be a limited experiment which will be reviewed and re-evaluated at the end of three years.

SECTION 5

Section 5(a) deletes subdivision (f) of Rule 37, of the Federal Rules of Civil Procedure which states: "Except to the extent permitted by statute, expenses and fees may not be awarded against the United States under this rule." This change reflects the belief that the United States should be liable for fees the same as private parties when it abuses discovery.

Section 5(b) conforms the Table of Rules of the Federal Rules of Civil Procedure by deleting the item relating to subdivision (f) of Rule 37.

Section 5(c) deletes the existing language regarding awards of fees under title 12, United States Code, section 1988. The deletion of this section is required because it is intended that cases arising under the internal revenue laws be covered by the provisions of 2412(d) of title 28 as added by this bill.

SECTION 6

Section 6 reinforces the statutory language and emphasizes the Congressional intent that the provisions of 2412(d) of title 28 as added by this bill shall not supercede or alter existing statutory authority for fee awards against the government.

SECTION 7

Section 7 makes the bill applicable to cases pending on the date of enactment.

TITLE 5 -- UNITED STATES CODE

CHAPTER 5 -- ADMINISTRATIVE PROCEDURE

* * * * * * *

Sec. 504. Costs and fees of parties

* * * * * * *

§ 504. Costs and fees of parties.

(a) An agency that conducts an adjudication subject to section 554 of this title shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the agency finds that the position of the agency as a party to the proceedings was substantially justified or that special circumstances make an award unjust. The agency may reduce the amount to be awarded, or deny an award, to the extent that the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy. The decision of the agency under this section shall be made a part of the record and shall include written findings and conclusions and the reason or basis therefor.

(b)(1) For the purposes of this section --

(A) 'fees and other expenses' includes the reasonable expenses of expert witnesses, the reasonable cost of any study, anaylsis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case, and reasonable attorney or agent fees. The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert shall be compensated at a rate in excess of the highest rate of compensation for experts paid by the agency involved; and (ii) attorney fees shall not be awarded in excess of $75 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee;

(B) 'party' means a "person" as defined in section 551 of this title, but excludes any individual whose net worth exceeded $1,000,000 at the time the adjudication was initiated, and any sole owner of an incorporated business, or any partnership, corporation, association, or organization whose net worth exceeded $5,000,000 at the time the adjudication was initiated; and

(C) "adjudication subject to section 554 of this title" does not include adjudication for the purposes of establishing or fixing a rate or for the purposes of granting or renewing a license.

(2) Except as otherwise provided in paragraph (1), the definitions provided in section 551 of this title apply to this section.

(c)(1) Each agency shall by rule establish procedures for the submission and consideration of applications for an award of fees and other expenses. If a court reviews the underlying decision of the agency adjudication, an award for fees and other expenses may be made only pursuant to section 2412(d)(3) of title 28.

(2) A party dissatisfied with the fee determination by the agency may petition for leave to appeal to the court of the United States having jurisdiction to review the merits of the underlying decision of the agency adjudication. If the court denies the petition for leave to appeal, no appeal may be taken from the denial. If the court grants the petition, it may modify the determination of the agency only if it finds that the failure to make an award, or the calculation of the amount of the award, was an abuse of discretion.

(d) Fees and other expenses awarded under this section shall be paid by the particular agency over which the party prevails from any sums appropriated to such agency, except that no sums may be appropriated to any such agency specifically for the purpose of paying fees and other expenses awarded under this section.

(e) The Office of the Chairman of the Administrative Conference of the United States shall report annually to the Congress on the amount of fees and other expenses awarded during the preceding fiscal year pursuant to this section. The report shall describe the number, nature, and amount of the awards, the claims involved in the controversy and any other relevant information which may aid the Congress in evaluating the scope and impact of such awards. Each agency shall provide the Conference with such information as is necessary for the Chairman to comply with the requirements of this subsection.

TITLE 28 -- UNITED STATES CODE

CHAPTER 161 -- UNITED STATES AS PARTY

* * * * * * *

Sec. 2412. Costs and fees

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§ 2412. Costs and fees

[Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action. A judgment for costs when taxed against the Government shall, in an amount established by statute or court rule or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by him in the litigation. Payment of a judgment for costs shall be as provided in section 2414 and section 2517 of this title for the payment of judgments against the United States.]

(a) Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, but not including fees and other expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity in any court when taxed against the Government shall, in an amount established by statute, court rule, or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by him in the litigation.

(b) In addition to the costs which may be awarded pursuant to subsection (a) and unless otherwise specifically prohibited, a court may award reasonable attorney fees to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, and the United States shall be liable to the same extent that a private party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

(c)(1) Any judgment against the United States or any agency or official of the United States acting in his official capacity for costs pursuant to subsection (a) shall be paid as provided in sections 2414 and 2517 of this title and shall be in addition to the compensation, if any, awarded in the judgment.

(2) Any judgment against the United States or any agency or official of the United States acting in his official capacity for fees and other expenses pursuant to subsection (b) shall be paid as provided in section 2414 and 2517 of this title unless the basis for the award is a finding that the United States acted in bad faith, in which case the award shall be paid by the agency found to have acted in bad faith and shall be in addition to the compensation, if any, awarded in the judgment.

(d)(1) In addition to the costs which may be awarded pursuant to subsection (a) and except as otherwise specifically provided by statute, a court shall award fees and other expenses to any party other than the United States which prevails in any civil action (other than cases sounding in tort)brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust. The court, in its discretion, may reduce the amount to be awarded pursuant to this subsection, or deny an award, to the extent that the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy. A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application which provides evidence of such party's eligibility for the award and the amount sought, including an itemized statement from attorneys and experts stating the actual time expended in representing such party and the rate at which fees were computed.

(2) For the purposes of this subsection --

(A) 'fees and other expenses' includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees. The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert shall be compensated at a rate in excess of the highest rate of compensation for experts paid by the United States; and (ii) attorney fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee;

(B) 'party' means any individual whose net worth is less than $1,000,000 at the time the civil action was filed, and any sole owner of an unincorporated business, or any partnership, corporation, association, or organization whose net worth was less than $5,000,000 at the time the civil action was filed; and

(C) 'United States' includes any agency, and any official of the United States acting in his official capacity.

(3) In awarding fees and other expenses under this subsection to a prevailing party in any action for judicial review of an agency adjudication conducted pursuant to section 554 of title 5, the court shall include in that award, the fees and other expenses for services performed during the administrative proceedings unless the court finds that during such proceedings the position of the United States was substantially justified, or that special circumstances make an award unjust.

(4) Fees and other expenses awarded under this subsection shall be paid by the particular agency over which the party prevails from any sums appropriated to such agency, except that no sums may be appropriated to any such agency specifically for the purpose of paying fees and other expenses awarded under this section.

(5) The Director of the Administrative Office of the United States Courts shall include in its annual report prepared pursuant to section 604 of this title, the amount of fees and other expenses awarded during the preceding fiscal year pursuant to this subsection. The report shall describe the number, nature, and amount of the awards, the claims involved in the controversy and any other relevant information which may aid the Congress in evaluating the scope and impace of such awards.

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TITLE 42 -- UNITED STATES CODE

CHAPTER 21 -- CIVIL RIGHTS

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Sec. 1988. Proceedings in vindication of civil rights.

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1893, 1985, and 1986 of this title, title IX of Public Law 92-318, [or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of a provision of the United States Internal Revenue Code,] or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

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RULES OF CIVIL PROCEDURE

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Rule 37. Failure to Make Discovery; Sanctions

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[(f) Expenses Against United States]

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Rule 37. Failure to Make Discovery; Sanctions

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[(f) Expenses Against United States. Except to the extent permitted by statute, expenses and fees may not be awarded against the United States under this rule.]

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96th Congress } HOUSE OF REPRESENTATIVES { Report
2d Session } { No. 96–1418

EQUAL ACCESS TO JUSTICE ACT

September 26, 1980.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. Kastenmeier, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 265]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (S. 265) entitled "Equal Access to Justice Act", having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendments are as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SHORT TITLE

Section 1. This Act may be cited as the "Equal Access to Justice Act".

FINDINGS AND PURPOSE

Sec. 2. (a) The Congress finds that certain individuals, partnerships, corporations, and labor and other organizations may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights in civil actions and in administrative proceedings.

(b) The Congress further finds that because of the greater resources and expertise of the United States, the standard for an award of fees against the United States should be different from the standard governing an award against a private litigant, in certain situations.

(c) It is the purpose of this Act—

(1) to diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in specified situations an award of attorney fees, expert witness fees, and other costs against the United States; and

(2) to insure the applicability in actions by or against the United States of the common law and statutory exceptions to the "American rule" respecting the award of attorney fees.

59–006 O

AWARD OF FEES AND OTHER EXPENSES IN CERTAIN AGENCY ACTIONS

SEC. 3. (a) Subchapter I of chapter 5 of title 5, United States Code, is amended by adding at the end thereof the following new section:

"§ 504. Costs and fees of parties

"(a)(1) An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by the party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency as a party to the proceeding was substantially justified or that special circumstances make an award unjust.

"(2) A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an award under this section, and the amount sought, including an itemized statement from any attorney, agent, or expert witness representing the party stating the actual time expended in representing the party and the rate at which fees and other expenses were computed. The party shall also allege that the agency acted without substantial justification.

"(3) The adjudicative officer of the agency may reduce the amount to be awarded, or deny an award, to the extent that the party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy. The decision of the adjudicative officer of the agency under this section shall be made a part of the record containing the final decision of the agency and shall include written findings and conclusions, and the reasons or basis therefor.

"(b)(1) For the purposes of this section—

"(A) 'fees and other expenses' includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case, and reasonable attorney or agent fees. (The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved, and (ii) attorney or agent fees shall not be awarded in excess of $75 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies a higher fee.);

"(B) 'person' means a person as defined in section 551(2) of this title, but excludes (i) any individual whose net worth exceeded $1,000,000 at the time the adversary adjudication was initiated, (ii) any sole owner of an unincorporated business, or any partnership, corporation, association, or organization, whose net worth exceeded $5,000,000 at the time the adversary adjudication was initiated and which is not an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of the Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), and (iii) any sole owner of an unincorporated business, or any partnership, corporation, association, or organization, having more than 500 employees at the time the adversary adjudication was initiated;

"(C) 'adversary adjudication' means an adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise, but excludes an adjudication for the purpose of establishing or fixing a rate or for the purposes of granting or renewing a license;

"(D) 'adjudicative officer' means the deciding official, without regard to whether the official is designated as an administrative law judge, a hearing officer or examiner, or otherwise, who presided at the adversary adjudication; and

"(E) 'party' means a party as defined in section 551(3) of this title, but excludes an agency.

"(2) Except as otherwise provided in paragraph (1), the definitions provided in section 551 of this title apply to this section.

"(c)(1) After consultation with the Chairman of the Administrative Conference of the United States, each agency shall by rule establish uniform procedures for the submission and consideration of applications for an award of fees and other expenses. If a court reviews the underlying decision of the adversary adjudication, an award for fees and other expenses may be made only pursuant to section 2412(d)(3) of title 28, United States Code.

"(2) A party dissatisfied with the fee determination made under subsection (a) may petition for leave to appeal to the court of the United States having jurisdiction to review the merits of the underlying decision of the agency adversary adjudication. If the court denies the petition for leave to appeal, no appeal may be taken from the denial. If the court grants the petition, it may modify the determination only if it finds that the failure to make an award, or the calculation of the amount of the award, was an abuse of discretion.

"(d)(1) Fees and other expenses awarded under this section may be paid by any agency over which the party prevails from any funds made available to the agency, by appropriation or otherwise, for such purpose. If not paid by any agency, the fees and other expenses shall be paid in the same manner as the payment of final judgments is made pursuant to section 2414 of title 28, United States Code.

"(2) There is authorized to be appropriated to each agency for each of the fiscal years 1982, 1983, and 1984 such sums as may be necessary to pay fees and other expenses awarded under this section in such fiscal years.

"(e) The Chairman of the Administrative Conference of the United States, after consultation with the Chief Counsel for Advocacy of the Small Business Administration, shall report annually to the Congress on the amount of fees and other expenses awarded during the preceding fiscal year pursuant to this section. The report shall describe the number, nature, and amount of the awards, the claims involved in the controversy and any other relevant information which may aid the Congress in evaluating the scope and impact of such awards. Each agency shall provide the Chairman with such information as is necessary for the Chairman to comply with the requirements of this subsection.".

(b) The table of sections of subchapter I of chapter 5 of title 5, United States Code, is amended by adding at the end thereof the following new item:

"504. Costs and fees of parties.".

(c) Effective October 1, 1984, section 504, and the item relating to section 504 in the table of sections, of title 5, United States Code, as added by subsections (a) and (b) of this section, are repealed, except that the provisions of such section shall continue to apply through the final disposition of any adversary adjudication, as defined in subsection (b)(1)(C) of such section, initiated before the date of repeal.

AWARD OF FEES AND OTHER EXPENSES IN CERTAIN JUDICIAL PROCEEDINGS

SEC. 4. (a) Section 2412 of title 28, United States Code, is amended to read as follows:

"§ 2412. Costs and Fees

"(a) Except as otherwise sepcifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, but not including fees and other expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity in any court having jurisdiction of such action. A judgment for costs when taxed against the United States shall, in an amount established by statute, court rule, or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by him in the litigation.

"(b) Unless expressly prohibited by statute, a court may award reasonable fees and other expenses of attorneys, in addition to the costs which may be awared pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity. The United States shall be liable for such fees and other expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

"(c)(1) Any judgment against the United States or any agency or official of the United States acting in his official capacity for costs pursuant to subsection (a) shall be paid as provided in sections 2414 and 2517 of this title and shall be in addition to any relief provided in the judgment.

"(2) Any judgment against the United States or any agency or official of the United States acting in his official capacity for fees and other expenses pursuant to subsection (b) shall be paid as provided in sections 2414 and 2517 of this title, except that if the basis for the award is a finding that the United States acted in bad faith, then the award shall be paid by any agency found to have acted in bad faith and shall be in addition to any relief provided in the judgment.

"(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award fees and other expenses, in addition to any costs awarded pursuant to subsection (a), to any party other than the United States that prevails in any civil action (other than cases sounding in tort) brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

"(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing the party stating the actual time expended in representing the party and the rate at which fees and other expenses were computed. The party shall also allege in such application that the United States acted without substantial justification.

"(C) The court, in its discretion, may reduce the amount to be awarded pursuant to this subsection, or deny an award, to the extent that the prevailing party, during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy.

"(2) For the purpose of this subsection—

"(A) 'fees and other expenses' includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and feasonable attorney fees. (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States, and (ii) attorney fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.);

"(B) 'party' means a party that is (i) an individual whose net worth did not exceed $1,000,000 at the time the civil action was filed, (ii) a sole owner of an unincorporated business, or a partnership, corporation, association, or organization, whose net worth did not exceed $5,000,000 at the time the civil action was filed, except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)) which is exempt from taxation under section 501(a) of the Code, and a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the amount of its net worth, or (iii) a sole owner of an unincorporated business, or a partnership, corporation, association, or organization, having not more than 500 employees at the time the civil action was filed; and

"(C) 'United States' includes any agency, and any official of the United States acting in his official capacity.

"(3) In awarding fees and other expenses under this subsection to a prevailing party in any action for judicial review of an adversary adjudication, as defined in subsection (b)(1)(C) of section 504 of title 5, United States Code, or subject to the Contract Disputes Act of 1978 (16 U.S.C. 601 et seq.), the court shall include in that award, the fees and other expenses authorized in subsection (a) of such section unless the court finds that during such adversary adjudication the position of the United States was substantially justified, or that special circumstances make an award unjust.

"(4)(A) Fees and other expenses awarded under this subsection may be paid by any agency over which the party prevails from any funds made available to the agency, by appropriation or otherwise, for such puropse. If not paid by any agency, the fees and other expenses shall be paid in the same manner as the payment of final judgments is made in accordance with sections 2414 and 2517 of this title.

"(B) There is authorized to be appropriated to each agency for each of the fiscal years 1982, 1983, and 1984 such sums as may be necessary to pay fees and other expenses awarded pursuant to this subsection in such fiscal years.

"(5) The Director of the Administrative Office of the United States Courts shall include in the annual report prepared pursuant to section 604 of this title, the amount of fees and other expenses awarded during the preceding fiscal year pursuant to this subsection. The report shall describe the number, nature, and amount of the awards, the claims involved in the controversy, and any other relevant information which may aid the Congress in evaluating the scope and impact of such awards.".

(b) The item relating to section 2412 in the table of sections for chapter 161 of title 28, United States Code, is amended to read as follows:

"2412. Costs and fees.".

(c) Effective October 1, 1984, subsection (d) of section 2412 of title 28, United States Code, as added by subsection (a) of this section, is repealed, except that the provisions of that subsection shall continue to apply through the final disposition of any action commenced before the date of repeal.

Sec. 5. (a) Subdivision (f) of rule 37 of the Federal Rules of Civil Procedure is repealed.

(b) The table of rules of the Federal Rules of Civil Procedure is amended by deleting the item relating to subdivision (f) of rule 37.

(c) Section 722 of the Revised Statutes (42 U.S.C. 1988) is amended by striking out "or in any civil action or proceeding by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code,".

Sec. 6. Nothing in section 2412 (d) of title 28, United States Code, as added by section 4 (a) of this Act, alters, modifies, repeals, invalidates, or supersedes any other provision of Federal law which authorizes an award of such fees and other expenses to any party other than the United States that prevails in any civil action brought by or against the United States.

Sec. 7. This Act and the amendments made by this Act shall take effect on October 1, 1981, and shall apply to any adversary adjudication, as defined in section 504(b)(1)(C) of title 5, United States Code, and any civil action described in section 2412 of title 28, United States Code, which is pending on, or commenced on or after, such date.

Amend the title so as to read:

An Act to provide for the payment by the United States of certain fees and costs incurred by prevailing parties in Federal agency adjudications and in civil actions in courts of the United States.

PURPOSE OF THE BILL

The bill rests on the premise that certain individuals, partnerships, corporations and labor and other organizations may be deterred from seeking review of, or defending against unreasonable governmental action because of the expense involved in securing the vindication of their rights. The economic deterrents to contesting governmental action are magnified in these cases by the disparity between the resources and expertise of these individuals and their government. The purpose of the bill is to reduce the deterrents and disparity by entitling certain prevailing parties to recover an award of attorney fees, expert witness fees and other expenses against the United States, unless the Government action was substantially justified. Additionally, the bill ensures that the United States will be subject to the common law and statutory exceptions to the American rule regarding attorney fees. This change will allow a court in its discretion to award fees against the United States to the same extent it may presently award such fees against other parties.

BACKGROUND

Legislation providing for the shifting of attorney fees in various situations has been under congressional evaluation for some time. Comprehensive hearings on the subject of attorney fees were held by the Senate in the 93rd Congress (see Senate Committee on the Judiciary, Subcommittee on Representation of Citizen Interests, "The Effect of Legal Fees on the Adequacy of Representation," Hearings, 93rd Cong., 1st sess., Sept. 19, 20, and Oct. 1, 2, 4, and 5, 1973) and by the House in the 94th Congress (see House Committee on the Judiciary, Subcommittee on Courts, Civil Liberties, and the Administration of Justice "Awarding of Attorneys Fees," Hearings, 94th Cong., 1st sess., Oct. 6, 8, and Dec. 3, 1975). During the 94th Congress, the Civil Rights Attorney's Fees Awards Act was processed as a result of the House hearings. The Act expanded the liability of losing parties for attorneys' fees in certain civil rights cases, and in some tax proceedings—brought by or on behalf of the United States—as well. This Act was a partial response to the Supreme Court's decision in the *Alyeska* case in May 1975. (See *Alyeska Pipeline* v. *Wilderness Society*, 421 U.S. 240 (1975).) In that case the Court had limited the inherent powers of courts to award fees when the prevailing party acted as a private attorney general. Courts were then to be limited to common law exceptions to the general American rule that a party pays its own fees, and to specific statutory authorization for attorney fees.

During the 95th Congress, hearings were held in both houses relating to the expansion of liability for attorney fees. (See, House Comm. on the Judiciary, Subcomm. on Courts, Civil Liberties, and the Administration of Justice, "The Awarding of Attorneys Fees in Federal Courts," Hearings, 95th Cong., 1st and 2d sessions, Nov. 16 and 17, 1977, and Apr. 26 and 27, 1978.) No consensus could be reached on a bill during that Congress, since questions were raised about the need for such legislation and the high projected costs to the United States.

During the 96th Congress, several bills were introduced in both houses to expand the liability of the United States for attorneys fees when it loses an administrative proceeding or a civil action. In the Senate, S. 265 was introduced on January 31, 1979. Hearings were held in the Subcommittee on Improvements in Judicial Machinery

(April 19, 20, and 21, 1979). The Committee on the Judiciary reported the bill on July 20 (S. Rept. 96–253), with amendments, and the bill passed the Senate, with further amendments, on July 31, 1979, by a vote of 94–3. S. 265 and most of the House versions of it (H.R. 2846, 6336, 6429) were referred to the Committee on the Judiciary. The last mentioned bill, because it had some provisions relating to the Small Business Administration, was jointly referred to the House Committee on Small Business. H.R. 6429 was the subject of hearings by the Subcommittee on SBA and SBIC Authority and General Small Business Problems (April 17, 23, and May 1, 1980), and was reported by the Committee on Small Business on May 16, 1980 (H. Rept., 96–1005, Part 1), with amendments.

During the 96th Congress the Subcommittee on Courts, Civil Liberties and the Administration of Justice, which as part of the Committee on the Judiciary, has primary jurisdiction over the subject of the awarding of attorneys' fees in federal cases, held two days of hearings (May 20 and June 24, 1980) on the subject of the awarding of attorneys fees against the United States. The focus of the hearings were S. 265, H.R. 6429 (including the version reported out of the House Small Business Committee), and H.R. 7208, which is the proposal introduced at the request of the Department of Justice. Witnesses included representatives of the business community, of the public interest community (ACLU, LCCRUL, Congress Watch, and the Council for Public Interest Law), the Departments of Justice and the Treasury, and three Senators, who were co-sponsors of S. 265. The Senators and business representatives (NFIB, SBLC, National Home Furnishings Association, Independent Association of Wisconsin, and the National Council of Farmer Cooperatives), as well as Rep. McDade, testified in support of S. 265/H.R. 6429. The Justice and Treasury Department witnesses opposed those bills—on the grounds that they were too broad, costly, and would have a chilling effect on the Federal enforcement of laws—and recommended that H.R. 7208 be adopted instead. In addition, they requested that tax proceedings and cases be covered in a separate bill (such as S. 1444, which is being reviewed in the Senate). Other government agencies have indicated their opposition to S. 265 and support for the provisions in H.R. 7208 (Small Business Administration—as contrasted to the Chief Counsel for Advocacy who supports S. 265; Tennessee Valley Authority; Federal Maritime Commission; the Office of the Chairman of the Administrative Conference of the United States; the Secretary of Transportation; OMB; the Department of Agriculture; the Securities and Exchange Commission; and the U.S. Department of Labor). The public interest witnesses expressed similar views, and have been joined by the Equal Justice Foundation and the AFL–CIO. They were concerned that prior attorney fee statutes were either to promote particular public policies (e.g., to enforce civil rights) or to punish bad faith or contemptuous behavior, while the standard for recovery in S. 265 was much broader.

The standard for recovery under S. 265 is that a prevailing party—who met the eligibility requirements—would be able to recover from the United States, unless the United States could show that its position was substantially justified or unless special circumstances make an award unjust. The standard in H.R. 7208 is that a prevailing party—who met a narrower financial eligibility requirement—may be able to recover in the discretion of the agency or court provided that prevailing party could show that the position of the United States was unreasonable.

As a result of the hearings, on September 4, 1980, the Subcommittee on Courts, Civil Liberties, and the Administration of Justice recommended to the Committee on the Judiciary that S. 265 be reported in amended form. On September 24, the Committee on the Judiciary considered S. 265 and recommended that it be passed with further amendments.

STATEMENT

Under present law in the United States, each party is responsible for the payment of his own attorney fees and other expenses incurred during litigation. The "American rule," however, has both common law and statutory exceptions.

The courts have inherent equitable power to award fees when overriding considerations of justice so demand. The courts traditionally have used this power under two well-recognized exceptions to the American rule. The "bad faith" exception allows an award where the losing party has willfully disobeyed a court order or has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. Under the "common fund" or "common benefit" exception, a court may award fees to a party whose legal action creates or preserves a fund of money or other assets for the benefit of others as well as himself. The exception also applies where substantial nonpecuniary benefits are protected, even though the suit actually brings no money into the court. The fees are recovered either from the fund or from the other parties enjoying the benefits of the legal action.

The American rule is also subject to numerous statutory exceptions. Congress has authorized the recovery fees in a variety of contexts, usually to effectuate a specific and compelling public interest. Among the recent enactments are titles II and VII of the Civil Rights Act of 1964 [42 U.S.C. sections 2000a–3(2); 2000e–5(k)]; title VIII of the Civil Rights Act of 1968 [42 U.S.C. 3612(c)]; title III of the Organized Crime Control Act (18 U.S.C., section 2520); the Freedom of Information Act (5 U.S.C. 552(a)(4)(E)); the Voting Rights Act of 1975, as amended [42 U.S.C. 1973l(e)]; the Consumer Product Safety Act (15 U.S.C. sections 2059(e)(4), 2060, 2072(a), 2073); and most recently, the Civil Rights Attorneys Fees Awards Act of 1976 (42 U.S.C. section 1988).

In the case of civil actions brought by or against the United States, the American rule prohibiting fee-shifting is itself statutory. Section 2412 of title 28, United States Code, provides that costs, but not attorney fees, may be awarded against the United States. The section is subject only to statutory exceptions such as the Freedom of Information Act, Privacy Act and the Civil Rights Act which specifically authorize awards against the United States, and not to the common law exceptions or to other statutory exceptions which do not expressly make the United States liable.

Senate bill 265, as amended, makes two changes in present law. First, it amends 28 U.S.C. 2412 to permit a court in its discretion to award attorney fees and other expenses to prevailing parties in civil litigation involving the United States to the same extent it may award fees in cases involving other parties. Thus, the United States would be liable for fees under he "bad faith," "common fund," and "common benefit" exceptions to the American rule. There appears to be no justification for exempting the United States in these situations; the change simply reflects the belief that, at a minimum, the United States should be held to the same standards in litigating as private parties. As such, it is consistent with the history of § 2412 which reflects a strong movement by Congress toward placing the Federal Government and civil litigants on a completely equal footing. (See generally, *Natural Resources Defense Council* v. *E.P.A.*, 484 F.2d 1331 (1st Cir. 1973).)

The bill makes a second significant change in the existing law regarding attorney fees by establishing a general statutory exception for an award of fees against the Government. Under this exception certain parties who prevail in adversary adjudications or civil actions brought by or against the United States will be entitled to attorney fees and related expenses unless the Government action was substantially justified or special circumstances would make an award unjust. This change is effectuated by adding a new section to title 5 of the United States Code, and by substantially amending section 2412 of title 28. Parties eligible to recover fees under these new sections include individuals whose net worth is less than $1 million and sole owners of unincorporated businesses, partnerships, corporations, associations, or other organizations whose net worth is less than $5 million. However, an agricultural cooperative, as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), and an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)) exempt from taxation under 501(a) of the Code, are both excluded from the net worth ceiling However, no party which is involved in an administrative proceeding or civil court action in its capacity as a business can be included under this provision of the bill if it has more than 500 employees at the time the adversary adjudication or civil action was initiated. The standards governing fee awards under this exception are explained in more detail below.

The American rule is grounded in the belief that a losing party should not be penalized for merely exercising his or her right to prosecute or defend a lawsuit. Thus, one of the stated purposes of the American rule is not to discourage or deter litigation. However, in many cases, particularly in litigation with the Government, the American rule is in fact having the opposite effect. For many citizens, the costs of securing vindication of their rights and the inability to recover attorney fees preclude resort to the adjudicatory process. When the cost of contesting a Government order, for example, exceeds the amount at stake, a party has no realistic choice and no effective remedy. In these cases, it is more practical to endure an injustice than to contest it.

The deterrent effect created by this inability to recover fees against the Government is particularly disturbing in light of the rapid growth in Government regulations in recent years. While the influance of the bureaucracy over all aspects of life has increased, the ability of most citizens to contest any unreasonable exercise of authority has decreased. Thus, at the present time, the Government with its greater resources and expertise can in effect coerce compliance with its position. Where compliance is coerced, precedent may be established on the basis of an uncontested order rather than the thoughtful presentation and consideration of opposing views. In fact, there is evidence that small businesses are the target of agency action precisely because they do not have the resources to fully litigate the issue. This kind of truncated justice undermines the integrity of the decision-making process.

The exception created by S. 265 focuses primarily on those individuals for whom cost may be a deterrent to vindicating their rights. The bill rests on the premise that a party who chooses to litigate an issue against the Government is not only representing his or her own vested interest but is also refining and formulating public policy. An adjudication or civil action provides a concrete, adversarial test of Government regulation and thereby insures the legitimacy and fairness of the law. An adjudication, for example, may show that the policy or factual foundation underlying an agency rule is erroneous or inaccurate, or it may provide a vehicle for developing or announcing more precise rules. The bill thus recognizes that the expense of correcting error on the part of the Government should not rest wholly on the party whose willingness to litigate ar adjudicate has helped to define the limits of Federal authority. Where parties are serving a public purpose, it is unfair to ask them to finance through their tax dollars unreasonable Government action and also bear the costs of vindicating their rights.

A. THE STANDARD

Under S. 265, fees will be awarded unless the Government can show that its action was substantially justified or that special circumstances make an award unjust. This standard balances the constitutional obligation of the executive branch to see that the laws are faithfully executed against the public interest in encouraging parties to vindicate their rights. Unlike the dual standards under the Civil Rights Acts developed in *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968) (prevailing plaintiffs should ordinarily recover their attorney's fees unless special circumstances would render an award unjust) and in *Christiansburg Garment Co.* v. *Equal Employment Opportunity Commission*, 434 U.S. 412, 421 (1978) (prevailing defendants should recover fees only upon a finding that a plaintiff's action was frivolous, unreasonable or without foundation), the standard in S. 265 is tailored to cover both prevailing plaintiffs and prevailing defendants in general litigation against the Government.

The test of whether or not a Government action is substantially justified is essentially one of reasonableness. Where the Government can show that its case had a reasonable basis both in law and fact, no award will be made. In this regard, the strong deterrents to contesting Government action require that the burden of proof rest with the Government. This allocation of the burden, in fact, reflects a general tendency to place the burden of proof on the party who has readier access to and knowledge of the facts in question. The committee believes that it is far easier for the Government, which has control of the evidence, to prove the reasonableness of its action than it is for a private party to marshal the facts to prove that the Government was unreasonable.

Certain types of case dispositions may indicate that the Government action was not substantially justified. A court should look closely at cases, for example, where there has been a judgment on the pleadings or where there is a directed verdict or where a prior suit on the same claim had been dismissed. Such cases clearly raise the possibility that the Government was unreasonable in pursuing the litigation.

The standard, however, should not be read to raise a presumption that the Government position was not substantially justified, simply because it lost the case. Nor, in fact, does the standard require the Government to establish that its decision to litigate was based on a substantial probability of prevailing. Furthermore, the Government should not be held liable where "special circumstances would make an award unjust." This "safety valve" helps to insure that the Government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts. It also gives the court discretion to deny awards where equitable considerations dictate an award should not be made.

B. THE PREVAILING PARTY

Under existing fee-shifting statutes, the definition of prevailing party has been the subject of litigation. It is the committee's intention that the interpretation of the term in S. 265 be consistent with the law that has developed under existing statutes. Thus, the phrase "prevailing party" should not be limited to a victor only after entry of a final judgment following a full trial on the merits. A party may be deemed prevailing if he obtains a favorable settlement of his case, *Foster* v. *Boorstin*, 561 F. 2d 340 (D.C. Cir. 1977); if the plaintiff has sought a voluntary dismissal of a groundless complaint, *Corcoran* v. *Columbia Broadcasting System, Inc.*, 121 F. 2d 575, (9th Cir. 1941); or even if he does not ultimately prevail on all issues, *Bradley* v. *School Board of the City of Richmond*, 416 U.S. 696 (1974).

In cases that are litigated to conclusion, a party may be deemed "prevailing" for purposes of a fee award in a civil action prior to the losing party having exhausted its final appeal. A fee award may thus be appropriate where the party has prevailed on an interim order which was central to the case, *Parker* v. *Matthews*, 411 F. Supp. 1059, 1064 (D.D.C. 1976), or where an interlocutory appeal is "sufficiently significant and discrete to be treated as a separate unit", *Van Hoomissen* v. *Xerox Corp.*, 503 F. 2d 1131, 1133 (9th Cir. 1974).

The bill as reported by the Committee on the Judiciary is essentially the same as the Senate passed bill. However, several changes were made, which are noted below:

1. To add a limit of 500 employees to the eligibility requirement of any business party who prevails and seeks fees. This figure is con-

sistent with the limit set by the White House Conference on Small Business.

2. To add an exclusion from the net worth ceiling for an organization described in section 501(c)(3) of the Internal Revenue Code of 1954.

3. To limit administrative proceedings to "adversary adjudications" in which the position of the U.S. is represented. It is basic fairness that the United States not be liable in an administrative proceeding in which its interests are not represented.

4. To exclude administrative proceedings under the Social Security Act. There was much discussion whether the United States should be liable when it is a named party and represented in a civil action under the Social Security Act. The Committee decided that civil actions should be covered.

5. To make the effective date October 1, 1981. This amendment served two purposes. It removed the bill from the scrutiny of the House Budget Committee since it will not take effect until fiscal year 1982 (October 1, 1981). The delay of a year will provide time for the committees with jurisdiction over tax matters to enact a separate bill. The Senate bill had delayed tax matters for 6 months. The Committee has received correspondence from the Ways and Means Committee opposing the inclusion of tax cases and indicating that they will be commencing hearings in early October on the subject.

6. To allow recovery of fees from the agencies or from the U.S. Treasury, and to authorize appropriations for that purpose. The Senate bill had provided that funds for most of this bill come from the agencies involved, and that no appropriations could be made for this specific purpose. This restriction was opposed as unduly punitive (there is an accounting procedure in the reporting section), and would result in a forced appropriation. This amendment insures that the prevailing party will be awarded a fee if it meets the requirements in the bill. It also keeps the language providing payment for "bad faith" actions by the agency involved.

7. To provide for consultation between the Chairman of the Administrative Conference of the U.S. and the Chief Counsel for Advocacy of the Small Business Administration on the annual report.

8. To have an "adjudicative officer" making the fee determination.

CONCLUSION

Providing an award of fees to a prevailing party represents one way to improve citizen access to courts and administrative proceedings. When there is an opportunity to recover costs, a party does not have to choose between acquiescing to an unreasonable Government order or prevailing to his financial detriment. Thus, by allowing an award of reasonable fees and expenses against the Government when its action is not substantially justified, S. 265 provides individuals an effective legal or administrative remedy where none now exists. By allowing a decision to contest Government action to be based on the merits of the case rather than the cost of litigating, S. 265 helps assure that administrative decisions reflect informed deliberation. In so doing, fee-shifting becomes an instrument for curbing excessive regulation and the unreasonable exercise of Government authority.

In this context, the committee believes that S. 265 serves the public interest and justifies an execption to the American rule that each party must bear his own costs in litigation. This is particularly so since the general statutory exception for awards against the United States represents a limited experiment. The bill has a sunset provision which repeals the relevant amendments to titles 5 and 28 at the end of 3 years. At that time, it is expected that the cost and impact of the legislation will be reviewed.

Section-by-Section Analysis of S. 265, the Equal Access to Justice Act

Section 1

Section 1 provides that the bill may be cited as the "Equal Access to Justice Act."

Section 2

Section 2 contains a statement of the Congressional findings on which the bill is based and the purpose for which it is intended.

Section 3

Section 3(a) amends chapter 5 of title 5, United States Code, by adding a new section, § 504, which provides for an award of reasonable fees and expenses to prevailing parties in agency adjudications under section 554 of title 5.

Under section 504(a), a party other than the United States who prevails in an adversary adjudication is entitled to reasonable fees and other expenses unless the adjudicative officer of the agency finds the position of the agency as a party to the proceedings was substantially justified or that special circumstances make an award unjust. The language used in this section is identical to language presently found in Rules 37, Federal Rules of Civil Procedure. Its effect is to place the burden on the government to make a positive showing that its position and actions during the course of the proceedings were substantially justified or that some other circumstance makes an award unjust. The test of whether or not a government action is substantially justified is essentially one of reasonableness. In order to defeat an award, the government must show that its case had a reasonable basis in law and fact. Absent such a showing, fees should be awarded unles some other circumstances make an award unjust. The section identifies one circumstance which may defeat or reduce an award—the actions of the prevailing party in unreasonably protracting the resolution of the controversy. The section further requires that the fee determination include specific written findings and conclusions which will be made a part of the record and which may be subject to judicial review under section 504(c)(2). The bill also sets out procedures in adversary adjudications (and later in court actions) by which the prevailing party may apply for fees. The party must make a simple allegation that the United States acted without substantial justification.

Alternative standards were considered. For example, S. 2354, the predecessor to S. 265 in the 95th Congress, allowed for automatic awards to prevailing parties. This mandatory award was rejected because it did not account for the reasonable and legitimate exercise of governmental functions and thus might have a chilling effect on proper government enforcement efforts. A purely discretionary standard was also considered. A discretionary standard, however, fails to account for the natural reluctance of agencies to award fees against themselves and also offers little direction to the exercise of agency discretion. The Department of Justice proposed standard, on the other hand, gives some definition and some guidance, but is unnecessarily restrictive. Under the Department's proposal, fees would be awarded only where the government action was "arbitrary, frivolous, unreasonable, or groundless, or the United States continued to litigate after it clearly became so." (See, *Christiansburg Garment Co.* v. *E.E.O.C.*, 434 U.S. 412, 417 (1978)). In order to recover fees under this standard, a party must first preval and then must marshal the facts to prove that the government action was arbitrary or frivolous. Placing this burden on the prevailing party makes awards difficult to obtain, particularly in agency proceedings. And where fees are to difficult to recover, the deterrent effect created by the cost of vindicating rights vis-a-vis the government would not be lessened.

The standard and burden of proof adopted in S. 265 represents an acceptable middle ground between an automatic award of fees and the restrictive standard proposed by the Department of Justice. It presses the agency to address the problem of abusive and harassing regulatory practices. It is intended to caution agencies to carefully evaluate their case and not to pursue those which are weak or tenuous. At the same time, the language of the section protects the government when its case, though not prevailing, has a reasonable basis in law and fact. Furthermore, it provides a safety valve where unusual circumstances dictate that the government is advancing in good faith a credible, though novel, rule of law.

The section covers only adversary adjudications under 554 of title 5 and not rulemaking or other administrative proceedings. In part, the decision to award fees only in adversary adjudications reflects a desire to narrow the scope of the bill in order to make its costs acceptable. It also reflects a desire to limit the award of fees to situations where participants have a concrete interest at stake but nevertheless may be deterred from asserting or defending that interest because of the time and expense involved in pursuing administrative remedies. In these situations, in order to insure that individuals will actively seek to protect their rights vis-a-vis the government, they must have the opportunity to recover the costs of litigating. An administrative remedy in these circumstances cannot be truly effective unless a prevailing party is made whole.

Section 504(b) defines terms used in the section. The "fees and other expenses" which may be recovered under this section include the reasonable fees of attorneys, agents and expert witnesses as well as the reasonable cost of any report, study or test which is necessary to the party's case. An "agent fee" may be awarded for the services of a non-attorney where an agency permits such agents to represent parties who come before it.

The definition establishes that fees are to be based on the prevailing market rate for the kind and quality of services rendered. However, no attorney or agent may be compensated at a rate in excess of $75 per hour unless special factors justify a higher fee. Such factors would include, but are not limited to, an increase in the cost of living or a limited availability of qualified attorneys with expertise in the particular proceedings involved. The ceiling on attorney fees relates only to the compensation of lawyers or agents (e.g., accountants themselves). It does not include their overhead expenses or other costs connected with their representation of a particular interest in a proceeding. This section is not intended to affect or limit the computation of reasonable attorney fees under any other provision of law authorizing an award of fees for litigation under a particular statute, such as the Civil Rights Acts, designed to promote private enforcement of that Act.

In general, consistent with the above limitations, the computation of attorney fees should be based on prevailing market rates without reference to the fee arrangements between the attorney and client. The fact that attorneys may be providing services at salaries or hourly rates below the standard commercial rates which attorneys might normally receive for services rendered is not relevant to the computation of compensation under the Act. In short, the award of fees is to be determined according to general professional standards.

The definition of "party" is consistent with section 551(3) of title 5, and includes a "person" named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a "person" admitted by an agency as a party for limited purposes.

The definition of "person" in this subsection identifies those individuals, businesses and organizations which may recover fees and expenses under this section. Those persons eligible to recover fees include individuals whose net worth does not exceed one million dollars and sole owners of unincorporated businesses, partnerships, corporations and associations or public or private organizations whose net worth does not exceed five million dollars. Excluded from the net worth limits are cooperative associations as defined in the Agricultural Marketing Act (12 U.S.C. 1141s(a)) and organizations described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3) exempt from taxation under section 501(a) of the Code. No business would be eligible if it employed more than 500 employees. The definition thus establishes financial criteria which limit the bill's applications to those persons and small businesses for whom costs may be a deterrent to vindicating their rights. "Net worth" is calculated by subtracting total liabilities from total assets. In determining the value of assets, the cost of acquisition rather than fair market value should be used.

The definition of "adjudicative adjudication" for the purpose of this section excludes ratemaking and licensing application hearings. However, the exclusion does not extend to proceedings under section 554 involving the suspension, annulment, withdrawal, limitation, amendment, modification or conditioning of license. A party who prevails in the latter circumstances is entitled to an award of attorney fees under the terms of this section.

Section 504(c)(1) directs each agency in consultation with the Chairman of the Administrative Conference to establish uniform procedures governing the awarding of fees. It is intended that the rules specify that an award will be made unless the government comes forward with a showing that its case was substantially justified or special circumstances make an award unjust. Thus, if no opposing petition is filed, an award should generally be made. Subsection (c)(1) further specifies that where the underlying adjudication is reviewed by a court, an award shall be made under 28 U.S.C. 2412(d)(3), a new section added by this bill. Under this section, an award by a court may cover the fees and expenses of the adversary administrative adjudication as well as the civil action upon review.

Section 504(c)(2) provides that a party who is dissatisfied with an agency decision regarding attorneys' fees (either the failure to award or the amount of the award) may petition for leave to appeal to the United States court which would have jurisdiction to review the merits of the underlying decision of the agency adversary adjudication. Review was made discretionary in order to prevent the inundation of the federal courts by routine appeals from fee determinations in agency adjudications. For similar reasons, the denial of a petition for leave to appeal is not reviewable. If a petition is granted, the court may reverse or modify the fee determination if it finds that the adjudicative officer of the agency abused its discretion.

Section 504(d) establishes that awards may be paid out of the budget of the agency whose actions are found substantially justified, thereby making each agency accountable for its actions. Funds may be appropriated to cover the costs of fee awards or may otherwise be made available by the agency (e.g.. through reprograming). If the agency does not pay the fees and expenses. then provision is made for payment from the U.S. Treasury in the same manner as pursuant to section 2414 of the 28, U.S. Code. An accounting will be kept of agencies responsible for such payments.

Section 504(e) directs the Chairman of the Administrative Conference of the United States in consultation with the Chief Counsel of Advocacy of the Small Business Administration to report annually regarding the number and amount of fee awards under this section. The report shall include relevant information including the average time period between initiation of agency action and payment of costs and fees to prevailing parties, the number of times in which the agency appealed the award of fees and expenses, and the result of such appeals. The report will allow Congress to evaluate the legislation's cost and impact on the regulatory process at the end of three years when it expires. The report may also stimulate Congressional oversight of those agencies which appear to be engaging in unreasonable regulatory activity.

Section 3(b) amends the table of chapters to reflect the addition of section 504.

Section 3(c) is a sunset provision, repealing section 504 of title 5 at the end of three years. The section makes clear, however, that section 504 will continue to apply through final disposition of any adjudication commenced before the date of repeal. The bill is intended to be a limited experiment which will be reviewed and de-evaluated at the end of three years.

Section 4

Section 4(a) amends section 2412 of title 28, United States Code, by adding new provisions regarding the award of attorney fees and other expenses in certain judicial proceedings.

Section 2412(a) preserves the law of the existing section 2412 which provides for a discretionary award of costs in any civil action brought by or against the United States. The cost which may be awarded are enumerated in section 1920 of title 28. They include the various fees payable to the court and its officials but they do not include the expense of legal counsel. Certain technical changes are necessitated by the addition of the subsections which follow:

Section 2412(b) permits a court in its discretion to award attorney fees and other expenses to prevailing parties in civil litigation involving the United States to the same extent it may award fees in cases involving other parties. The courts so empowered are those defined in section 451 of title 28, United States Code. This is consistent with the present law in section 2412. "Other expenses" as noted in section 2412 (b) will be those which are presently available against other parties under this subsection. Thus, under this subsection, cases involving the United States would be subject to the "bad faith", "common fund" and "common benefit" exceptions to the American rule against fee-shifting. The United States would also be liable under the same standards which govern awards against other parties under Federal statutory exceptions, unless the statute expressly provides otherwise. This subsection clarifies the liability of the United States under such statutes as the Civil Rights Attorney's Fees Awards Act of 1976, as well. There is no financial eligibility of the prevailing party under this subsection.

It has been generally held that existing section 2412 prevents an award of attorney fees against the United States, even under the common law exceptions, in the absence of express statutory authority. The issue, however, continues to be the subject of litigation. See, e.g., *Pealo* v. *Farmers Home Administration of the United States*, 562 F.2d 744 (D.C. Cir. 1977) (reversing lower court's application of "common benefit" exception); *Rhode Island Committee on Energy* v. *General Services Administration*, 561 F.2d 397 (1st Cir. 1977) (refusing to apply "bad faith" conception). This subsection reflects the belief that at a minimum, the United States should be held to the same standard in litigating as other parties and that no justification exists for exempting the United States from fee awards in these limited situations.

Section 2412(c)(1) incorporates language found in existing section 2412 which establishes that judgments for costs are to be paid as provided for in sections 2414 and 2517 of title 28. Section 2412(c)(2) establishes that fees and expenses under subsection (b) are to be paid in the same manner as costs unless the award is based upon a finding that the United States acted in bad faith. In those circumstances, the award is to be paid by the governmental entity found to have acted in bad faith. This fiscal responsibility is intended to make the individual agencies and departments accountable for actions pursued in bad faith. The awards and resulting impact on the budget will provide a concrete basis for evaluating agency error.

Section 2412(d) authorizes an award of reasonable fees and expenses in judical proceedings analogous to the awards authorized in adversary adjudications under section 3 of this bill.

Under subsection 2412(d)(1)(A) a party other than the United States who prevails in certain civil actions brought by or against the United States is entitled to reasonable fees and other expenses unless the government action was substantially justified or other circumstances make an award unjust. The subsection applies to all civil actions except those sounding in tort (but does not exclude Constitutional torts) and those already covered by existing fee-shifting statutes. Tort cases were excluded because the bill's sponsors considered the legal remedies adequate and equitable in those cases. Moreover, this section is not intended to replace or supercede any existing fee-shifting statutes such as the Freedom of Information Act, the Civil Rights Acts, and the Voting Rights Act in which Congress has indicated a specific intent to encourage vigorous enforcement, or to alter the standards or the case law governing those Acts. It is intended to apply only to cases (other than tort cases) where fee awards against the government are not already authorized.

The same standard which is applied in adversary adjudications under Section 3(a) of this bill, is also applied to fee awards in civil actions under this subsection. Courts are often reluctant to award fees because they have operated so long under the American rule prohibiting fee-shifting. In fact, the reluctance of the courts to award fees prompted the adoption of the language in Rule 37 on which this standard is based. Under these circumstances, it is particularly appropriate to place the burden on the government to prove the reasonableness of its actions. To do so encourages parties to contest action which they believe to be unreasonable and thereby serves to refine public policy.

Under Section 2412(d)(1)(B), a party seeking an award of fees must apply to the court within 30 days of final judgment. This language, however, should not be construed to require a final judgment on the merits before a court may award fees. Further, as in the case of adversary adjudications, it is intended that if the government does not oppose an application for fees, the award should be granted.

Subsection 2412(d)(2) defines terms which apply to this subsection. The definitions of "fees and expenses," "party," and "person" are explained under section 3(a) of this bill. (New section 504(b) of title 5.)

Subsection 2412(d)(3) provides that a court may award fees to a party who prevails upon judicial review of an adversary adjudication. In these cases in particular, where a party has had to engage in lengthy administrative proceedings before final vindication of his or her rights in the courts, the government should have to make a strong showing to demonstrate that its action was reasonable. This subsection has been expanded to include judicial review, not only of adversary adjudications under section 554 of title 5, United States Code, but also judicial review of adversary adjudications (where the position of the United States is represented by counsel or otherwise) under the Contract Disputes Act of 1978. In no case would an award be made for an adversary adjudication under the Contract Disputes Act, if the only purpose for judicial review was to seek attorney fees.

Subsection 2412(d)(4) establishes that awards under this subsection may be paid by the agency whose action is found not to be substantially justified. Funds may be appropriated to cover the costs of fee awards or may otherwise be made available by the agency (e.g. through reprogramming). If the agency does not pay the fees and expenses, then provision is made for payment from the U.S. Treasury pursuant to sections 2414 and 2517 of title 28, U.S. Code. An accounting will be kept of agencies responsible for such payments.

Subsection 2412(d)(5) directs the Administrative Office of the United States Courts to report annually regarding the number and amount of fee awards under this subsection and other relevant information. The report will allow Congress to evaluate the legislation's cost and impact on agency litigation when it expires at the end of three years. The report may also stimulate Congressional oversight of those agencies or departments which appear to be engaging in unreasonable litigation.

Section 4(b) of the bill conforms the item relating to section 2412 in the table of sections for chapter 161 of title 28.

Section 4(c) is a sunset provision, repealing subsection (d) of section 2412 of title 28 at the end of three years. The section makes clear, however, that subsection (d) will continue to apply through final disposition of any action commenced before the date of repeal. Subsection (d) which parallels the authorization of awards in agency proceedings is likewise intended to be a limited experiment which will be reviewed and re-evaluated at the end of three years.

Section 5

Section 5(a) deletes subdivision (f) of Rules 37, of the Federal Rules of Civil Procedure which states: "Except to the extent permitted by statute, expenses and fees may not be awarded against the United States under this rule." This change reflects the belief that the United States should be liable for fees the same as other parties when it abuses discovery.

Section 5(b) conforms the Table of Rules of the Federal Rules of Civil Procedures by deleting the item relating to subdivision (f) of Rule 37.

Section 5(c) deletes the existing language regarding awards of fees under title 42, United States Code, section 1988. The deletion of this section is required because it is intended that cases arising under the internal revenue laws be covered by the provisions of 2412(d) of title 28 as added by this bill.

Section 6 reinforces the statutory language and emphasizes the Congressional intent that the provisions of section 2412(d) of title 28, as added by this bill, shall not supercede or alter existing statutory authority for fee awards against the government.

Section 7

Section 7 makes the effective date of the Act and amendments October 1, 1981. It clarifies that it shall apply to adversary adjudications and civil actions pending on, or commenced on or after, such date.

TITLE

Finally the long title is amended to read: "An Act to provide for the payment by the United States of certain fees and cost incurred by prevailing parties in Federal agency adjudications and in civil action in courts of the United States."

COMMITTEE VOTE

On September 4, 1980, S. 265 was reported favorably with an amendment by a vote of 7–1. On September 24, 1980, S1 265 was ordered reported favorably with amendments by a voice vote, with 17 members being present.

ESTIMATED COST OF THE LEGISLATION

The Committee estimates that the cost of the legislation will be $92 million for each of the fiscal years—FY 1982–1984, and $20 million for fiscal year 1985. The Committee accepts the estimate of the Congressional Budget Office for FY 1982, but believes that this legislation will result in a decrease in the actual administrative proceedings and civil actions which the United States will litigate without substantial justification. It is expected that this bill will make the United States proceed more cautiously and evaluate its losses. The Department of Justice has estimated that this legislation, as originally introduced in the House, would exceed $125 million per year in costs. However, the Committee has eliminated non-adversary adjudications (including administrative proceedings under the Social Security Act) from the coverage of the principal part of this bill, and believes that is a significant factor in reducing the cost.

INFLATION IMPACT STATEMENT

The bill will have no foreseeably inflationary impact on prices or costs in the operation of the national economy.

OVERSIGHT

The Committee makes no oversight finding, but will closely monitor the impact of this legislation through the annual reports required under it.

STATEMENT OF THE COMMITTEE ON GOVERNMENT OPERATIONS

No statement has been received on the legislation from the House Committee on Government Operations.

NEW BUDGET AUTHORITY

This bill does authorize appropriations for the purposes of the bill, but also allows recovery from the U.S. Treasury, as provided under section 724a of title 31, United States Code.

STATEMENT OF THE CONGRESSIONAL BUDGET OFFICE

Pursuant to clause 7, rule XIII of the Rules of the House of Representatives, and section 403 of the Congressional Budget Act of 1974, the following is the cost estimate on S. 265 prepared by the Congressional Budget Office.

U.S. Congress,
Congressional Budget Office,
Washington, D.C., September 26, 1980.

Hon. Peter W. Rodino, Jr.,
Chairman, Committee on the Judiciary, U.S. House of Representatives, Washington, D.C.

Dear Mr. Chairman: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has prepared the attached cost estimate for S. 265, the Equal Access to Justice Act.

Should the Committee so desire, we would be pleased to provide further details on this estimate.

Sincerely,

Alice M. Rivlin,
Director.

Congressional Budget Office—Cost Estimate

1. Bill number: S. 265.

2. Bill title: Equal Access to Justice Act.

3. Bill status: As ordered reported by the House Committee on the Judiciary, September 24, 1980.

4. Bill purpose: The purpose of this bill is to provide for the payment by the U.S. government of attorney fees and certain other expenses incurred by prevailing parties, other than the United States, in federal agency adversary adjudications and in civil actions brought by or against the United States. The federal government would not be required to award these fees and expenses when the position of the involved agency is substantially justified. Awards would be paid by funds made available to the agency over which the party prevails for that purpose or by the General Accounting Office pursuant to sections 2414 or 2517 of title 28 of the United States Code.

If enacted, S. 265 would become effective on October 1, 1981. The bill would authorize appropriation of such sums as may be necessary to make award payments during fiscal years 1982, 1983, and 1984.

5. Cost estimate:

	Millions
Estimated authorization level:	
Fiscal year:	
1981	-----
1982	$92
1983	109
1984	129
1985	-----
Estimated outlays:	
Fiscal year:	
1981	-----
1982	69
1983	115
1984	126
1985	20

6. Basis of estimate: A key determinant of the potential costs of this legislation is the total number of cases affected by the bill. These cases

would be those that the government would lose and for which it could not or would not show substantial justification for prosecuting. As mandated by the bill, tort and tax court cases have been excluded. The bill also excludes from coverage individuals having a net worth of $1 million or more, and certain businesses or other organizations. No estimate of the number of cases excluded by these requirements is available, but it is expected that these exclusions would not have a significant impact on aggregate costs associated with enactment of this bill.

In 1979, approximately 60,000 cases involving the federal government terminated in the federal district, claims, customs, and appeals courts. This figure includes approximately 3,500 tax cases and 56,500 other civil cases. These tax cases are those considered in courts other than the U.S. Tax Court. Based on results of a Department of Justice survey, it was assumed that the United States would lose 15 percent of the tax cases and 20 percent of all other cases. In preparing this estimate, it was assumed that the United States would lose a total of 11,800 cases per year. There is no historical base from which to estimate that proportion of cases for which the government would be unable to demonstrate substantial justification for its action. For the purpose of this estimate, it has been assumed that the government could not or would not attempt to show a substantial justification for its action in 25 percent of the cases lost. (In some cases, the cost in both time and dollars of such a justification may result in a Justice Department decision not to contest the awarding of fees, even when substantial justification may exist.) Therefore, the base number of cases for which an award of attorney fees and other costs would have been made was assumed to be approximately 3,000 cases in 1979. This figure has been inflated by 6 percent per year to reflect anticipated increases in cases terminated. This inflation rate is anticipated based on growth data, which is available as a historical base. This calculation results in an estimate of approximately 3,500 awards in fiscal year 1982, and 3,700 and 4,000 awards in fiscal years 1983 and 1984, respectively.

Approximately 230,000 administrative adjudications were terminated in fiscal year 1978, according to data prepared by the Administrative Conference of the United States. Social Security Administration (SSA) cases account for more than 91 percent of all administrative adjudication cases. SSA cases are not adversarial, as defined by the bill; therefore, a total of less than 20,000 agency adjudication cases, based on 1978 data, would be expected to be subject to the terms of this section.

Based on information supplied by some of the agencies involved, it has been assumed that all agency adjudications, other than those involving the SSA, are adversarial and that a 55 percent loss rate can be applied to administrative adjudications. Employing the 25 percent award rate used for judicial proceedings, it has been assumed that awards would be made in approximately 2,700 cases per year.

The estimated average award for judicial proceedings, excluding tax cases, was based on two surveys of awards in 1977. The average award in cases surveyed was approximately $16,000 for attorney fees. In addition to attorney fees, it was assumed that an award would be made for other costs incurred, such as expert witness fees, costs of studies or reports, and any other costs deemed necessary for the support of the case. This additional amount was assumed to be $2,000 in 1977. The total amount has been inflated to $25,000 for fiscal year 1982 and increased in each successive year by the CBO projection of the consumer price index (CPI). This amount has been applied to 50 percent of the judicial cases estimated above, except tax cases. A $15,000 award has been applied to the balance of non-tax cases. The larger award was applied to only one-half of the cases because approximately 50 percent of U.S. civil cases commenced in district courts are terminated without court action and are, therefore, expected to cost less to pursue.

Average awards in tax cases were estimated to be $12,000 for cases in the District Court in 1982, and $30,000 in the Appeals Court for cases that are decided by the court. It has been assumed that only 50 percent of these cases will be decided by the court. Awards of $8,000 have been assumed for the balance of cases filed in the District Courts, and $20,000 has been applied to 50 percent of Appeals Court tax cases. These figures have also been increased over the projection period by CBO's estimated CPI. The total cost for all judicial proceedings has been estimated to be approximately $67.7 million in fiscal year 1982, $77.6 million in fiscal year 1983, and $90.0 million in fiscal year 1984.

The average awards for administrative adjudications for all types of cases were estimated to be $7,200 for attorney fees and other costs in fiscal year 1982. This figure has also been inflated by CBO's projected increase in the CPI. The total cost for administrative adjudications has been estimated to be $19.4 million in fiscal year 1982, increasing to $21.3 million and $22.4 million in fiscal years 1983 and 1984, respectively.

The costs derived above were increased by 5 percent in 1982, 10 percent in 1983, and 15 percent in 1984, to reflect the reporting requirements specified in the bill and the impact that enactment of this bill would have on the size of awards and the number of cases. This was done for two reasons. First, since the government must show substantial justification for its actions, more time and money is expected to be spent by the government and private attorneys in establishing whether an award will be made. Second, since the bill states that "it is the purpose of this Act to diminish the deterrent effect of seeking review of, or defending against, governmental action . . .," case loads in both judicial and administrative proceedings are expected to increase faster than the historical rate by virtue of the existence of this legislation.

It has been assumed that not all funds will be spent during the year for which they are authorized to be appropriated. This is because it is expected that there will be some delay required to process awards.

7. Estimate comparison: A recent estimate prepared by the Office of Management and Budget estimates first year costs of $205 million. Much of the difference between the OMB and CBO estimates is because of OMB's assumptions of higher awards, substantial increases in cases terminated resulting from enactment of this bill, and an assumption that additional litigating personnel would be required by the government.

No estimates from other sources are currently available on the cost of this bill as ordered reported by the Committee. Estimates were made of the bill as introduced. For its March 15, 1979, report to the Senate Committee on the Budget, the Senate Judiciary Committee assumed a government loss rate of 15 to 25 percent, but assumed that awards would be made in only 10 to 15 percent of the cases the government loses. The Committee, in estimating awards, did not include amounts for costs other than attorney fees.

On April 10, 1979, the Department of Justice (DOJ) testified on the cost of S. 265 as introduced. DOJ's methodology in estimating costs of awards resulting from judical cases was similar to that of CBO's; CBO's figures have been adjusted because of the availability of more current and complete information, and higher attorney fees to reflect the effects of inflation. The DOJ estimate did not include amounts for costs other than attorney fees in calculating the amounts of awards. Administrative adjudication costs were estimated to be at least as much as judicial proceedings.

8. Previous CBO estimate: On April 15, 1980, the Congressional Budget Office prepared a cost estimate for H.R. 6429, the Small Business Equal Access to Justice Act, as ordered reported by the House Committee on Small Business. On July 18, 1979, CBO prepared a cost estimate for S. 265, a similar bill ordered reported by the Senate Committee on the Judiciary. The above estimate differs from the previous ones because of differences in the bills and because this estimate is based on more recent and complete data.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 5, UNITED STATES CODE

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PART I—THE AGENCIES GENERALLY

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CHAPTER 5—ADMINISTRATIVE PROCEDURE

SUBCHAPTER I—GENERAL PROVISIONS

Sec.
500. Administrative practice; general provisions.
501. Advertising practice; restrictions.
502. Administrative practice; Reserves and National Guardsmen.
503. Witness fees and allowances.
504. Costs and fees of parties.

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§504. Costs and fees of parties

(*a*)(*1*) *An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by the party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency as a party to the proceeding was substantially justified or that special circumstances make an award unjust.*

(2) A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an award under this section, and the amount sought, including an itemized statement from any attorney, agent, or expert witness representing the party stating the actual time expended in representing the party and the rate at which fees and other expenses were computed. The party shall also allege that the agency acted without substantial justification.

(3) The adjudicative officer of the agency may reduce the amount to be awarded, or deny an award, to the extent that the party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy. The decision of the adjudicative officer of the agency under this section shall be made a part of the record containing the final decision of the agency and shall include written findings and conclusions, and the reasons or basis therefor.

(b) (1) For the purposes of this section—

(A)"fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case, and reasonable attorney fees (The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved, and (ii) attorney or agent fees shall not be awarded in excess of $75 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies a higher fee.);

(B) "person" means a person as defined in section 551(2) of this title, but excludes (i) any individual whose net worth exceeded $1,000,000 at the time the adversary adjudication was initiated, (ii) any sole owner of an unincorporated business, or any partnership, corporation, association, or organization, whose exceeded $5,000,000 at the time the adversary adjudication was initiated and which is not an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of the Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), and (iii) any sole owner of an unincorporated business, or any partnership, corporation, association, or organization, having more than 500 employees at the time the adversary adjudication was initiated;

(C) "adversary adjudication" means an adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise, but excludes an adjudication for the purpose of establishing or fixing a rate or for the purposes of granting or renewing a license;

(D) "adjudicative officer" means the deciding official, without regard to whether the official is designated as an administrative law judge, a hearing officer or examiner, or otherwise, who presided at the adversary adjudication; and

(E) "party" means a party as defined in section 551(3) of this title, but excludes an agency.

(2) Except as otherwise provided in paragraph (1), the definitions provided in section 551 of this title apply to this section.

(c)(1) After consultation with the Chairman of the Administrative Conference of the United States, each agency shall by rule establish uniform procedures for the submission and consideration of applications for an award of fees and other expenses. If a court reviews the underlying decision of the adversary adjudication, an award for fees and other expenses may be made only pursuant to section 2412(d)(3) of title 28, United States Code.

(2) A party dissatisfied with the fee determination made under subsection (a) may petition for leave to appeal to the court of the United States having jurisdiction to review the merits of the underlying decision of the agency adversary adjudication. If the court denies the petition for leave to appeal, no appeal may be taken from the denial. If the court grants the petition, it may modify the determination only if it finds that the failure to make an award, or the calculation of the amount of the award, was an abuse of discretion.

(d)(1) Fees and other expenses awarded under this section may be paid by any agency over which the party prevails from any funds made available to the agency, by appropriation or otherwise, for such purpose. If not paid by any agency, the fees and other expenses shall be paid in the same manner as the payment of final judgments is made pursuant to section 2414 of title 28, United States Code.

(2) There is authorized to be appropriated to each agency for each of the fiscal years 1982, 1983, and 1984 such sums as may be necessary to pay fees and other expenses awarded under this section in such fiscal years.

(e) The Chairman of the Administrative Conference of the United States, after consultation with the Chief Counsel for Advocacy of the Small Business Administration, shall report annually to the Congress on the amount of fees and other expenses awarded during the preceding fiscal year pursuant to this section. The report shall describe the number, nature, and amount of the awards, the claims involved in the controversy and any other relevant information which may aid the Congress in evaluating the scope and impact of such awards. Each agency shall provide the Chairman with such information as is necessary for the Chairman to comply with the requirements of this subsection.

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TITLE 28, UNITED STATES CODE

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CHAPTER 161—UNITED STATES AS PARTY GENERALLY

Sec.
2401. Time for commencing action against United States.
2402. Jury trial in actions against United States.
2403. Intervention by United States or a State; constitutional question.
2404. Death of defendant in damage action.
2405. Garnishment.
2406. Credits in action by United States; prior disallowance.

Sec.
2407. Delinquents for public money; judgment at return term; continuance.
2408. Security not required of United States.
2409. Partition action involving United States.
2409a. Real property quiet title actions.
2410. Actions affecting property on which United States has lien.
2411. Interest.
2412. Cost *and fees*.
2413. Executions in favor of United States.
2414. Payment of judgments and compromise settlements.
2415. Time for commencing actions brought by the United States.
2416. Time for commencing actions brought by the United States—Exclusions.

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§ 2412. Costs and Fees

[Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action. A judgment for costs when taxed against the Government shall, in an amount established by statute or court rule or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by him in the litigation. Payment of a judgment for costs shall be as provided in section 2414 of section 2517 of this title for the payment of judgments against the United States.]

(a) Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, but not including fees and other expenses of attorneys, may be awarded to the preaviling party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity in any court having jurisdiction of such action. A judgment for costs when taxed against the United States shall, in an amount established by statute, court rule, or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by him in the litigation.

(b) Unless expressly prohibited by statute, a court may award reasonable fees and other expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity. The United States shall be liable for such fees and other expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

(c)(1) Any judgment against the United States or any agency or official of the United States acting in his official capacity for costs pursuant to subsection (a) shall be paid as provided in sections 2414 and 2517 of this title and shall be in addition to any relief provided in the judgment.

(2) Any judgment against the United States or any agency or official of the United States acting in his official capacity for fees and other expenses pursuant to subsection (b) shall be paid as provided in sections 2414 and 2517 of this title, except that if the basis for the award is a finding that the United States acted in bad faith, then the

award shall be paid by any agency found to have acted in bad faith and shall be in addition to any relief provided in the judgment.

(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award fees and other expenses, in addition to any costs awarded pursuant to subsection (a), to any party other than the United States that prevails in any civil action (other than cases sounding in tort) brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing the party stating the actual time expended in representing the party and the rate at which fees and other expenses were computed. The party shall also allege in such application that the United States acted without substantial justification.

(C) The court, in its discretion, may reduce the amount to be awarded pursuant to this subsection, or deny an award, to the extent that the prevailing party, during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy.

(2) For the purposes of this subsection—

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of an study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States, and (ii) attorney fees shall not be awarded in excess of \$75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.);

(B) "party" means a party that is (i) an individual whose net worth did not exceed \$1,000,000 at the time the civil action was filed, (ii) a sole owner of an unincorporated business, or a partnership, corporation, association, or organization, whose net worth did not exceed \$5,000,000 at the time the civil action was filed, except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)) which is exempt from taxation under section 501(a) of the Code, and a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regradless of the amount of its net worth, or (iii) a sole owner of an unincorporated business, or a partnership, corpora-

tion, association, or organization, having not more than 500 employees at the time the civil action was filed; and

(C) "United States" includes any agency, and any official of the United States acting in his official capacity.

(3) In awarding fees and other expenses under this subsection to a prevailing party in any action for judicial review of an adversary adjudication, as defined in subsection (b)(1)(C) of section 504 of title 5, United States Code, or subject to the Contract Disputes Act of 1978 (16 U.S.C. 601 et seq.), the court shall include in that award, the fees and other expenses authorized in subsection (a) of such section unless the court finds that during such adversary adjudication the position of the United States was substantially justified, or that special circumstances make an award unjust.

(4)(A) Fees and other expenses awarded under this subsection may be paid by any agency over which the party prevails from any funds made available to the agency, by appropriation or otherwise, for such purpose. If not paid by any agency, the fees and other expenses shall be paid in the same manner as the payment of final judgments is made in accordance with sections 2414 and 2517 of this title.

(B) There is authorized to be appropriated to each agency for each of the fiscal years 1982, 1983, and 1984 such sums as may be necessary to pay fees and other expenses awarded pursuant to this subsection in such fiscal years.

(5) The Director of the Administrative Office of the United States Courts shall include in the annual report prepared pursuant to section 604 of this title, the amount of fees and other expenses awarded during the preceding fiscal year pursuant to this subsection. The report shall describe the number, nature, and amount of the awards, the claims involved in the controversy, and any other relevant information which may aid the Congress in evaluating the scope and impact of such awards.

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FEDERAL RULES OF CIVIL PROCEDURE

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Rule 37. Failure to Make Discovery: Sanctions
  (a) Motion for order compelling discovery.
    (1) Appropriate court.
    (2) Motion.
    (3) Evasive or incomplete answer.
    (4) Award of expenses of motion.
  (b) Failure to comply with order.
    (1) Sanctions by court in district where deposition is taken.
    (2) Sanctions by court in which action is pending.
  (c) Expenses on failure to admit.
  (d) Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection.
  (e) Subpoena of person in foreign country.
  [(f) Expenses against United States.]

* * * * * * *

Rule 37. Failure to Make Discovery: Sanctions

(a) Motion for order compelling discovery.

A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) * * *

* * * * * * *

[(f) Expenses against United States]

[Except to the extent permitted by statute, expenses and fees may not be awarded against the United States under this rule.]

* * * * * * *

SECTION 722 OF THE REVISED STATUTES

SEC. 722. The jurisdiction in civil and criminal matters conferred on the district and circuit courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, title IX of Public Law 92–318, [or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code,] or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.".

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96th Congress, 2d Session } HOUSE OF REPRESENTATIVES { No. 96-1005, Part 1

SMALL BUSINESS EQUAL ACCESS TO JUSTICE ACT

May 16, 1980.—Ordered to be printed

Mr. Smith of Iowa, from the Committee on Small Business,
submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany H.R. 6429 which on February 5, 1980, was referred jointly to the Committee on Small Business and the Committee on the Judiciary]

[Including cost estimate of the Congressional Budget Office]

The Committee on Small Business to whom was referred the bill (H.R. 6429) entitled "Small Business Equal Access to Justice Act," having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

TITLE I—SMALL BUSINESS ADMINISTRATION OFFICE OF ADVOCACY

Sec. 101. Title II of Public Law 94-305, approved June 1976 (90 Stat. 669; 15 U.S.C. 634b) is amended as follows:

(a) by striking all of section 202 after the semicolon in subsection (9) and inserting the following:

"(10) determine the desirability of developing a set of rational, objective criteria to be used to define small business, and to develop such criteria, if appropriate; and

"(11) advise, cooperate with, and consult with the Attorney General of the United States, Federal agencies, and the Chairman of the Administrative Conference, in order to facilitate collective relief afforded to small businesses under the Small Business Equal Access to Justice Act;" and

(b) by adding the following new sections and renumbering the remaining sections accordingly:

"REPORTS ON FEE AND COST AWARDS

"Sec. 207. The Chief Counsel for Advocacy, not later than March 31, 1981, and every two years thereafter, shall submit a report to the President and to the Congress on—

"(1) the number, character and dollar value of cost and fee awards paid to small businesses pursuant to the Small Business Equal Access to Justice Act;

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"(2) the time period between the initiation of the formal action upon which costs and fees were awarded to a small business, the award of such costs and fees and the payment to the small business of such costs and fees;

"(3) the number of instances where a Federal agency appealed the award of costs and fees under such Act; and

"(4) an assessment of whether such Act has caused expeditious resolution of small business disputes with Federal agencies.".

TITLE II—SMALL BUSINESS EQUAL ACCESS TO JUSTICE

SEC. 201. (a) The Congress finds that certain individuals, partnerships, corporations, and labor and other organizations may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights in civil actions and administrative proceedings.

(b) The Congress further finds that because of the greater resources and expertise of the Federal Government, the standard for an award of fees against the United States should be different from the standard governing an award against a private litigant, in certain situations.

(c) It is the purpose of the Act—

(1) to diminish the deterrant effect of seeking review of, or defending against, unreasonable governmental action by providing in specified situations an award of attorney fees, expert witness fees, and other costs, against the United States; and

(2) to insure the applicability in actions by or against the United States of the common law and statutory exceptions to the "American rule" respecting the award of attorney fees.

AWARD OF ATTORNEY FEES AND OTHER EXPENSES IN CERTAIN AGENCY ACTIONS

SEC. 202. (a) Subchapter I of chapter 5, title 5, United States Code, is amended by adding at the end thereof the following new section:

"§ 504. Costs and fees of parties

"(a) An agency, or the United States Postal Service, that conducts an adjudication subject to section 554 of this title, sections 204 or 401 of title 39, or section 605 of title 41 shall award, to a party with a direct and personal interest other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency as a party to the proceedings was substantially justified or that special circumstances make an award unjust. The adjudicative officer of the agency may reduce the amount to be awarded, or deny an award, to the extent that the private party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy. The decision of the agency under this section shall be made a part of the record and shall include written findings and conclusions and the reason or basis therefor.

"(b) (1) For the purposes of this section—

"(A) 'fees and other expenses' includes the reasonable expenses of expert witnesses, the cost of any study, analysis, engineering report, test, or project which is found by the adjudicative officer of the agency to be reasonably necessary for the preparation of the party's case, the cost of the party's personal absence from business at an hourly rate, reasonable attorney or agent fees and other reasonable and necessary costs directly related to the party's case. The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert shall be compensated at a rate in excess of the highest rate or compensation for experts paid by the agency involved; and (ii) attorney fees shall not be awarded in excess of $80 per hour unless the agency determines by regulation that an increase in the cost of living or special factors, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee;

"(B) 'party' means a 'person' as defined in section 551 of this title, who has a personal interest in the case, but excluding any individual whose net worth exceeded $1,000,000 at the time the adjudication was initiated, and any sole owner of an unincorporated business, or any partnership, corporation, association, including a cooperative association as defined in the Agricultural Marketing Act (12 U.S.C. 1141j(a)) or organization whose net worth exceeded $5,000,000 at the time the adjudication was initiated;

"(c) 'adjudication subject to section 554 of this title, section 204 of title 39, or section 601 of title 41' does not include adjudication for the purposes of establishing or fixing a rate or for the purposes of granting or renewing a license; and

"(D) adjudicative officer means the official of the agency, whether designated as an administrative law judge or hearing officer or otherwise, who presided at the adjudication.

"(2) Except as otherwise provided in paragraph (1), the definitions provided in section 551 of this title apply to this section.

"(c)(1) After consultation with the Chairman of the Administrative Conference, each agency shall by rule establish uniform procedures for the submission and consideration of applications for an award of fees and other expenses. If a court reviews the underlying decision of the agency adjudication, an award for fees and other expenses may be made only pursuant to section 2412(d)(3) of title 28.

"(2) A party dissatisfied with the fee determination by the agency may petition for leave to appeal to the court of the United States having jurisdiction to review the merits of the underlying decision of the agency adjudication. If the court denies the petition for leave to appeal, no appeal may be taken from the denial. If the court grants the petition, it may modify the determination of the agency if it finds that the failure to make an award, or the calculation of the amount of the award, was not substantially justified based upon a de novo review of the record.

"(d) Fees and other expenses awarded under this section shall be paid by the particular agency from any sums appropriated to such agency, except that no sums may be appropriated to any such agency specifically for the purpose of paying fees and other expenses awarded under this section.

"(e) The Office of the Chairman of the Administrative Conference of the United States shall report annually to the Congress on the amount of fees and other expenses awarded during the preceding fiscal year pursuant to this section. The report shall describe the number, nature, and amount of the awards, the claims involved in the controversy and any other relevant information which may aid the Congress in evaluating the scope and impact of such awards. Each agency shall provide the Conference with such information as is necessary for the Chairman to comply with the requirements of this subsection.".

(b) The table of sections of subchapter I of chapter 5, title 5, United States Code, is amended by adding at the end thereof the following new item:

"504. Costs and fees of parties.".

(c) Effective 3 years after the date of enactment of this act, section 504 of title 5, United States Code, as added by subsection (a) of this section, is repealed, except that the provisions of that section shall continue to apply through final disposition of any adjudication commenced before the date of repeal.

AWARD OF ATTORNEY FEES AND OTHER EXPENSES IN CERTAIN JUDICIAL PROCEEDINGS

SEC. 203. (a) Section 2412 of title 28, United States Code, is amended to read as follows:

"§ 2412. Costs and fees

"(a) Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, but not including fees and other expenses of attorneys, may be awarded to the other party in any civil action brought by or against the United States or any agency or department, including the United States Postal Service, or official of the United States acting in his official capacity in any court having jurisdiction of such action. A judgment for costs when taxed against the Government shall, in an amount established by statute, court rule, or order, be limited to reimbursing in whole or in part the other party for the costs incurred by him in the litigation.

"(b) In addition to the costs which may be awarded pursuant to subsection (a) and unless otherwise specifically prohibited, a court may award reasonable attorney fees to the private party in any civil action brought by or against the United States or any agency, department or official of the United States acting in his official capacity, or the United States Postal Service, and the United States shall be liable to the same extent that a private party would be liable under the common law or under the terms of any statute which specifically provided for such an award.

"(c)(1) Any judgment against the United States or any agency or official of the United States acting in his official capacity for fees and other expenses pursuant to subsection (b) shall be paid as provided in sections 2414 and 2517 of this title and shall be in addition to the compensation, if any, awarded in the judgment.

"(2) Any judgment against the United States or any agency or official of the United States acting in his official capacity for fees and other expenses pursuant to subsection (b) shall be paid as provided in sections 2414 and 2517 of this title unless the basis for the award is a finding that the United States acted in bad faith, in which case the award shall be paid by the agency found to have acted in bad faith and shall be in addition to the compensation, if any, awarded in the judgment.

"(d)(1) In addition to the costs which may be awarded pursuant to subsection (a) and except as otherwise specifically provided by statute, a court shall award fees and other expenses to any party other than the United States which in any civil action (other than cases sounding in tort) brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust. The court, in its discretion, may reduce the amount to be awarded pursuant to this subsection, or deny an award, to the extent that the private party, during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controvery. A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application which provides evidence of such party's eligibility for the award and the amount sought, including an itemized statement from attorneys and experts stating the actual time expended in representing such party and the rate at which fees were computed.

> "(A) 'fees and other expenses' includes the reasonable expenses of expert witnesses, the cost of any study, analysis, engineering report, test, or project which is found by the court to be reasonably necessary for the preparation of the party's case, the cost of the party's personal absence from business at an hourly rate, reasonable attorney fees and other reasonable and necessary costs related to the party's case. The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert shall be compensated at a rate in excess of the highest rate of compensation for experts paid by the United States; and (ii) attorney fees shall not be awarded in excess of $80 per hour unless the court determines that an increase in the cost of living or special factors, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee;
>
> "(B) 'party' means any individual whose net worth is less than $1,000,000 at the time the civil action was filed, any sole owner of an unincorporated business, or any partnership, corporation, association, including a cooperative association as defined in the Agricultural Marketing Act (12 U.S.C. 1141j(a)) or organization whose net worth was less than $5,000,000 at the time the civil action was filed; and
>
> "(C) 'United States' includes any agency, and any official of the United States acting in his official capacity.

"(3) In awarding fees and other expenses under this subsection to a private party in any action for judicial review of an agency adjudication conducted pursuant to section 554 of title 5, the court shall include in the award, the fees and other expenses for services performed during the administrative proceedings unless the court finds that during such proceedings the position of the United States was substantially justified, or that special circumstances make an award unjust.

"(4) Fees and other expenses awarded under this subsection shall be paid by the particular agency from any sums appropriated to such agency, except that no sums may be appropriated to any such agency specifically for the purpose of paying fees and other expenses awarded under this section.

"(5) The Director of the Administrative Office of the United States Courts shall include in its annual report prepared pursuant to section 604 of this title, the amount of fees and other expenses awarded during the preceding fiscal year pursuant to this subsection. The report shall describe the number, nature, and amount of the awards, the claims involved in the controversy and any other relevant information which may aid the Congress in evaluating the scope and impact of such awards.".

(b) The item relating to section 2412 in the table of sections for chapter 161 of title 28, United States Code, is amended to read as follows:

"2412. Costs and fees.".

(c) Effective 3 years after the date of enactment of this act, subsection (d) of section 2412, as added by subsection (a) of this section, is repealed, except that the provisions of that subsection shall continue to apply through final disposition of any action commenced before the date of repeal.

SEC. 204. (a) Subdivision (f) of rule 37 of the Federal Rules of Civil Procedure is repealed.

(b) The table of rules of the Federal Rules of Civil Procedure is amended by deleting the item relating to subdivision (f) of rule 37.

(c) Section 722 of the Revised Statutes (42 U.S.C. 1988), is amended by striking out "or in any civil action or proceeding by or on behalf of the United States of America, to enforce, or charging a violation of a provision of the United States Internal Revenue Code,".

SEC. 205. Nothing in section 2412(d) of title 28, United States Code, as added by section 203(a) of this act, alters, modifies, repeals, invalidates, or supersedes any other provision of State or Federal law which authorizes an award of such fees and other expenses to any party, other than the United States, who prevails in any civil action brought by or against the United States.

SEC. 206. (a) Except as provided in subsection (b), this act, and the amendments made by this act, shall apply to any adjudication or civil action which is pending on the effective date of this act, or which is commenced on or after the effective date of this act.

(b) This act, and the amendments made by this act, shall apply to any civil action arising under the internal revenue laws of the United States which is pending on the date which is six months after the effective date of this act, or which is commenced on or after such date.

SEC. 207. The Office of the Chairman of the Administrative Conference of the United States and Director of the Administrative Office of the United States Courts shall provide to the Small Business Office of Advocacy the information required to be collected in title I of this act.

SEC. 208. This act shall take effect October 1, 1980.

THE PURPOSE OF THE BILL

The purpose of the bill, H.R. 6429, is to allow individuals and small businesses to be reimbursed for their court costs and associated expenses if they are successful in an action with the Government, unless it is shown that the Government was substantially justified in its claim or that special circumstances would make such an award unjust. This legislation is intended to respond to a chronic problem small business owners have had contesting or challenging the unreasonable exercise of Government authority because of the time and expense required to challenge the vast resources of the Federal Government. It is expected this bill will cause agencies to be more deliberative in their regulatory activity.

BACKGROUND AND INTRODUCTION

The committee's Subcommittee on SBA and SBIC Authority and General Small Business Problems held 3 days of hearings on this bill, April 17, 23 and May 1. During these hearings testimony was received in support of this bill from individual small business owners who have encountered difficulties with the Federal Government, trade associations, and other private and Government witnesses.

Throughout the hearings the committee was provided with numerous examples of Government actions against individual small business owners that were indefensible. Many witnesses stated that they had been frustrated by the maze of the agency review processes. All too frequently, the review process of an agency was unknown to the private citizen. Consistently, the committee was told of agency insensitivity to the problems of the small business community. Without exception, small business owners indicated this legislation would be beneficial to them and would enable many of them to better defend themselves and fight unwarranted Government charges that previously have gone unchallenged.

Based on the hearings, a number of refining amendments were considered and accepted by the subcommittee during markup. Significant discussions occurred concerning the eligibility for award of fees in the case of a settlement, a withdrawal of the case by the Government and a partial decision for a private party. Additionally, the eligibility of an intervenor for reimbursement and the standards to be used to determine the Government liability were carefully considered.

The definition of a prevailing party posed a difficult problem. The subcommittee members, in response to testimony, deleted the word "prevailing" from the statute in order to clearly indicate that a final decision by an agency or the court against the Government was not an essential requirement for the award of costs and fees associated with the dispute. The subcommittee believed that in addition to those private parties who prevail on all issues in litigation or by final administrative order, a party also should be eligible for recovery if he obtains a favorable settlement, a voluntary dismissal, or where he may be deemed to have prevailed due to a decision in his favor or prevailed on less than all the issues or if the amount of the judgment against his was only a fraction of the amount the Government sought.

The subcommittee also added the phrase "direct and personal interest" to the definition of "eligible party for costs and fees" to insure that only a party that has been or will be injured can benefit under the statute. The subcommittee determined to specifically exclude intervenors.

The subcommittee also carefully considered the alternative standards for award of fees proposed by the Department of Justice. It rejected the Justice Department's recommendation that the burden of proof be shifted to the individual. The subcommittee also agreed not to accept the Justice Department's proposal that the standard for award be changed from "not substantially justified" to a more rigid "arbitrary or capricious" standard.

Lastly, the subcommittee removed the provision of the bill requiring that the private party show, upon judicial review, that the decision by an agency was an abuse of discretion. The subcommittee believed that the presumption of regularity should not be attached to the agency's decision to award fees and costs.

The bill, with amendments, was reported unanimously from the subcommittee on May 6, 1980. The full committee again considered whether it would be appropriate to reduce the standard necessary for the Government to justify its action from "substantially justified" to "arbitrary, frivolous, unreasonable or groundless." An amendment to alter the standard was soundly defeated. The full committee ordered the bill favorably reported on May 13, 1980 by a vote of 29 to 0, without any additional amendments.

NEED FOR THE LEGISLATION

During the last two decades there has been an unprecedented expansion of Government regulation of small business. This, in turn, has spawned a dramatic increase in the number of administrative and judicial proceedings brought against small businesses by Federal agencies. Due to small business' limited resources and the Federal Government's inexhaustible assets, an obvious inequality in dispute resolutions has surfaced. This combination, coupled with the effect of legal principles that do not recognize these changes, has created a case resolution system that, for a small business, is based almost exclusively on economic criteria rather than what is right. The result is an unbalanced regulatory enforcement system that emphasizes, virtually to the exclusion of all other issues, the cost of potential litigation.

As is often the case, legal principles developed in England prior to the 18th century still remain in force in the United States. The "American Rule" which requires that each party shall bear his/her own cost of litigation in such a principle. The purpose of the rule was to insure that parties would assert or protect their rights without fear of being penalized for their actions. It did not and does not recognize the disparity of resources between the opposing parties. The administration of justice was believed to be better served if all parties know that the only costs one had to bear were his own. Of course, such a rule is based on the assumption that the costs of securing or vindicating one's rights has an equal economic impact on each party to a dispute. The rule only makes sense when each party is equally affected by the costs of litigation.

When an individual or small business is required to defend against an unreasonable Federal action, the disparity in the resources each brings to the dispute is enormous. This strikes at the essence of the rule which requires each to bear the burden of the costs independently. Testimony before your committee made this point very clear. Small business owners, if confronted with a regulatory dispute with the Government, routinely pay fines and/or sign consent orders, however unjustified or unreasonable. Similarly put, regardless of the merits of the situation, it is cheaper for the businessman to give in than it is to fight the Federal agency. This type of action, based solely on the cost of fighting back, seriously undercuts our system of justice.

In cases involving Government action, small business does not have the resources to defend itself against unjustified claims. Further, the cost of vindication routinely exceed the amounts at stake. Lastly, the Government does not have the economic incentive or disincentive to closely evaluate the reasonableness of its case before proceeding. For these reasons it appears that the American rule is inappropriate in actions involving the Government and individuals or small businesses.

The result, of course, is a Federal enforcement system that operates unfettered by the usual checks and balances that are common to our system of Government. The existence of this policy can only lead to a further erosion of the belief that this is a Government of laws and not of men.

This is not to say that all Federal actions are unjustified or unreasonable. Unfortunately, the expansion of quasi-judicial regulatory mechanisms has significantly increased the number of Federal actions that clearly do not meet the usual standards of fairness expected of this Government. The impact of an unreasonable action nonetheless carries the full power of the Federal Establishment behind it and is legitimatized by that power. Therefore, when faced with that overwhelming power, the small business owner capitulates even though that action is improper.

The testimony of a number of small businesses before the committee can be summarized as follows: "My lawyer told me he thought I had a good chance to win, but the costs would be so great it would be cheaper to pay the fine." Certainly, there can be no greater frustration for a small business already struggling to comply with numerous Federal regulations, than to find out that it is not enough to be right. To continue to allow the financial situation of the small business or individual to determine whether an unjust action is contested, is clearly unreasonable.

The costs of contesting a Federal action quickly mount up. In addition to attorneys' fees, a specialist in that area of Federal regulation often must be hired to provide advice that is even partially equal to that of the Government's 67,500 attorneys. The cost of responding to Government discovery, and the accumulations and summarization of the business files must also be counted. Experts are often necessary, as are special studies. All these costs must be added to the time the business owner spends away from the day-to-day operation of the business where he or she usually represents the entire financial and operational talent of the business. For example, one witness testified that he spent $40,000 in attorneys' fees alone, defending against one unreasonable Federal suit of 4 years duration and that suit was dismissed by the court when it finally came to trial. The $40,000 represented 2 years' earnings (not profits) for this small firm of 16 employees.

It must be noted that the real aim of this legislation is not to spend great sums to pay the costs of fighting unwarranted Federal action. Rather, it is intended that the act will force the Federal departments and agencies to substantially improve the quality of their enforcement and other proceedings. But let there be no mistake, your committee clearly intends that where a small business or individual prevails against the Government either in toto or in substance, reasonable costs and fees shall be paid to him unless the Government can show that its action was substantially justified.

WHAT THE BILL WOULD DO

TITLE I

Title I would require the Chief Council for Advocacy of the Small Business Administration to cooperate and consult with all appropriate

Federal agencies in an effort to maximize equal access to justice for small businessmen and women.

The Chief Counsel is further required to collect the necessary data to evaluate the usefulness of this act toward facilitating the redress of injury caused by unreasonable Government action. A report is required to be submitted to the President and Congress which would insure that information is available to assess whether the objectives of the legislation would have been achieved. This report would be issued prior to the 3-year statutory termination of this act.

TITLE II

Title II seeks to eliminate the barriers that prohibit small businesses and individuals from securing vindication of their rights in civil actions and administrative proceedings brought by or against the Federal Government. The act would accomplish this by permitting small businesses and individuals to recover attorneys' fees and other costs of litigation from the Federal Government. Your committee recognizes the need to balance the rights of small businesses and individuals who seek review on the merits and the need for vigorous and appropriate enforcement of our laws. Therefore, the act carefully defines the test for determining the appropriateness of such an award, the parties which are eligible for an award and the instances when such an award can be considered.

WHO CAN CLAIM

To be eligible for an award of attorney fees and other costs, the bill would require a party to be either an individual whose net worth does not exceed $1 million, or a business entity or other organization whose net worth does not exceed $5 million. The definition of "party" would exclude the Government, as well as those who do not have a direct and personal interest in the action. It is the belief of your committee that this act should not provide funds for intervenors, friends of the court, or others who have not been injured or likely to suffer irreparable harm.

WHEN A CLAIM CAN BE MADE

The bill would require that in order to be eligible for an award of costs and fees, either a plaintiff or defendant must have "prevailed." Substantial discussion on the definition of "prevailing" led your committee to remove the word from the bill in order to more clearly indicate that a final decision on the merits is not the only instance where an award may be made. The committee intends that awards shall not be limited to a favorable decision by an administrative law judge, agency, department or multidepartment review board or court. It expects that an award may be made where a settlement or a dismissal, either voluntary or directed, has occurred in favor of a private party or where the private party has prevailed on less than all the issues.

A party could also be deemed to have prevailed for purposes of fee award prior to a final judgment. For example, fees may be awarded on the basis of an interim order which is central to the case or where an interlocutory appeal is sufficiently significant or discrete to be treated as a separate unit. Your committee intends that the occasions where an award may be made shall be broadly construed.

WHEN A CLAIM CAN BE DENIED

Your committee intends that costs and fees shall be awarded to an eligible private party in a civil dispute when the private party has prevailed, unless the Government can show that its action was substantially justified or that special circumstances make an award unjust. This standard balances the constitutional obligation of the executive branch to faithfully execute the laws with the public's interest in the vindication of private rights.

The test of whether a Government action is substantially justified would be essentially one of reasonableness. Where the Government can show that its case had a reasonable basis, both in law and in fact, no award would be made. In this regard, the strong deterrents to contesting Government action that currently exists require that the burden of proof rest with the Government. This allocation of the burden, in fact, reflects a general tendency to place the burden of proof on the party who has easier access to and knowledge of the facts in question. Your committee believes that it is far easier for the Government, which has control of the evidence, to prove the reasonableness of its action that for a private party to marshal the facts to prove that the Government was unreasonable.

Your committee specifically rejected the standard found in the *Christianburg Garment Co.* v. *Equal Employment Opportunity Commission*, 434 U.S. 412, 421 (1978). The committee believes that the proposal to shift the burden of proof to the private party as required by the *Christianburg* standard was clearly too restrictive and contrary to the intent of the bill. The implication in the *Christianburg* case that plaintiffs be preferred over defendants or that either plaintiff or defendant be favored, one over the other, was considered inappropriate. Any attempt to add restrictive tests was not considered acceptable. The substantially justified standard would require that the court review the Government's action, without presumption, on the basis of the record. The Government would be required to show that its actions were substantially justified by the law and the facts if it is to avoid paying these fees.

Certain types of case dispositions may indicate that Government action was not substantially justified. A court should look closely at individual cases, for example, where there has been a judgment on the pleadings, where there is a directed verdict or where a prior suit on the same claim has been dismissed or lost on the merits. Such cases clearly raise the possibility that the Government was unreasonable in pursuing the action or was merely forum shopping.

The standard, however, should not be read to raise a presumption that the Government position was not substantially justified simply because it lost the case. likewise, no presumption of reasonableness should be attached to the Government's actions. Nor would the standard require the Government to establish that its decision to litigate was based on more than a reasonable possibility of prevailing. Furthermore, the Government should not be held liable where "special circumstances would make an award unjust." This "safety valve" will help to insure that the Government is not deterred from advancing in good faith a close question of law or fact. It also would give the court discretion to deny awards where equitable considerations dictate an award should not be made, such as when there is unwarranted delay by the private party.

WHAT CAN BE CLAIMED

Your committee expects awards to include the reasonable costs incurred in adequately preparing for and prosecuting a case. This includes, but is not limited to, the reasonable fees for attorneys and expert witnesses, and the cost of reports, studies or tests reasonably needed to support the private party's case. In addition, the award should include the cost of the party's personal absence from business at an hourly rate. With respect to attorneys' fees, they would be based on the prevailing market rate for the kind and quality of services rendered. The act specifically would provide that no attorney may be compensated at a rate in excess of $80 per hour, unless special factors justify a higher fee.

SOURCE OF FUNDS FOR CLAIMS

In addition, this bill would stipulate that all funds for the awarding of fees must come from the budgets of the agencies, or departments whose actions have been adjudged to be not substantially justified. This fiscal responsibility is intended to make the agencies and departments more accountable for their actions. The impact of awards from the agency budgets would provide a quantitative measure of agency abuses and would encourage congressional oversight of departmental and agency practices and regulations.

CONCLUSION

The small business community has been denied its due process and equal protection rights guaranteed by the Constitution due to the cost of disputing the Federal Government. In far too many cases, a small business is forced to accept an unjust settlement or ruling simply because it does not have the financial ability to request a further review of the matter on the merits. On the other hand, your committee received testimony from small business owners who nonetheless elected to fight the Government on principle and ultimately won but then faced bankruptcy due to the costs involved. They may have won the battle, but have lost the war to survive.

Your committee believes that those small businesses who elect to fight a decision by the Government should be able to recover their costs. It is clear that the reimbursement of costs will not make them whole, but cost reimbursement from the agencies' budget will act as a deterrent to those agencies and departments which unfairly use their economic might to force unjust settlements and decisions upon those who do not have the resources to fight back.

It should also be noted that authorizing reimbursement for attorney fees and other costs was 12th among the recommendations of the recently concluded White House Conference on Small Business. Your committee fully agrees with this priority and urges its endorsement by the entire membership of the House.

MATTERS REQUIRED TO BE DISCUSSED UNDER HOUSE RULES

In compliance with clause 2(l)(2) of rule XI of the House of Representatives, the following statement is made relative to the recorded vote on the motion to report H.R. 6429, as amended.

A majority of the committee voted in person and was actually present and the motion was approved by a recorded vote of 29 ayes and 0 nays, with 5 votes being cast by proxy.

In compliance with clause 2(l)(3) of the rule XI of the Rules of the House of Representatives, the following statements are made:

> With regard to subdivision (A), relating to oversight findings, the committee finds, in keeping with clause 2(b)(1) of rule X, that this legislation is in full compliance with the provision of this rule of the House, which states:
>
> "In addition, each such committee shall review and study any conditions or circumstances which may indicate the necessity or desirability of enacting new or additional legislation within the jurisdiction of that committee. * * * "
>
> With regard to subdivision (B), relating to the statement required by section 308(a) of the Congressional Budget Act of 1974, the following statement is made relative to the legislation:
>
> "Section 3(a)(2) of the Congressional Budget Act defines the term 'tax expenditures' as those revenue losses attributable to provisions of the Federal tax laws which allow a special exclusion, exemption, or deduction from gross income or which provide a special credit, a preferential rate of tax, or a deferral of tax liability."

None of the provisions of H.R. 6429 deals with taxation and thus, in your committee's opinion, this bill does not provide new or increased tax expenditures.

Section 3(a)(2) of the Congressional Budget Act defines the term "budget authority" as authority provided by law to enter into obligations which will result in immediate or future outlays involving Government funds.

Under this definition, it is the final action of Congress that authorizes an agency to enter into obligations which constitutes new budget authority. In those cases which entail (1) an authorization for an agency to undertake a program; (2) an authorization for appropriation of funds to permit that agency to enter into obligations; and (3) an actual appropriation of such funds, it would be only the final action of Congress in appropriating funds which constitutes the budget authority.

None of the provisions of H.R. 6429 appropriates funds and thus, in your committee's opinion, the bill does not provide new budget authority. Accordingly, no comparison of budget authority, outlays or tax expenditures or 5-year projections have been made.

With regard to subdivisions (C) and (D), the cost estimate of the Director of the Congressional Budget Office relative to H.R. 6429 follows:

U.S. Congress,
Congressional Budget Office,
Washington, D.C., April 15, 1980.

Hon. Neal Smith,
Chairman, Committee on Small Business, U.S. House of Representatives, Rayburn House Office Building, Washington, D.C.

Dear Mr. Chairman: At the request of your committee staff, the Congressional Budget Office has prepared the attached cost estimate for H.R. 6429, the Small Business Equal Access to Justice Act.

Should the Committee so desire, we would be pleased to provide further details on this estimate.

Sincerely,

Alice M. Rivlin,
Director.

Congressional Budget Office Cost Estimate

1. Bill number: H.R. 6429.
2. Title title: Small Business Equal Access to Justice Act.
3. Bill status: As introduced and referred jointly to the House Committee on the Judiciary and the Committee on Small Business, February 5, 1980.
4. Bill purpose: The purpose of this legislation is to provide for an award of attorney fees, expert witness fees, and other costs to certain parties who prevail in a review of, or in defending against, government actions in certain administrative adjudications and civil actions. The prevailing party is entitled to these awards only if the government does not show that its action was substantially justified. The legislation expires three years after enactment.
5. Cost estimate:

Fiscal years (In millions of dollars):	*Estimated costs*
1981	$153
1982	187
1983	228
1984	---
1985	---

6. Basis of estimate: The following presents the methodology used to estimate the cost of this legislation. For the purpose of this estimate, an effective date of October 1, 1980 has been assumed.

Case loads

A key determinant of the potential costs of this legislation is the total number of cases affected by the bill. These cases would be those that the government would lose and for which it could not or would not show substantial justification for prosecuting. As mandated by the bill, tort and Tax Court cases have been excluded. The bill also excludes from coverage individuals having a net worth of $1 million or more, and any sole owner of an unincorporated business, or any partnerships, corporations, associations, or organizations having a net worth of $5 million or more. No estimate is available of the proportion of cases so excluded. Also excluded were those cases for which fees and other costs are already authorized, such as Freedom of Information Act and Title VII cases. In fiscal year 1979, approximately 45,000 cases involving the federal government terminated in the district, claims, customs, and appeals courts (4,083 tax cases and 40,880 other types of civil cases). It was assumed that the government would lose 15 percent of the tax cases and 20 percent of all other cases. These assumptions are based on a Justice Department survey which indicated that in fiscal years 1976 and 1977, the government lost an average of 15 to 25 percent of its cases. It was then assumed that the government could not or would not attempt to show a substantial justification for prosecuting in 25 percent of the cases lost. (In some cases, the cost in both time and dollars of such a justification may result in a Justice Department decision not to contest the awarding of fees, even when substantial justification may exist.) Therefore, the base number of cases for which an award of attorney fees and other costs is made was assumed to be approximately 2,200 cases per year, or less than 5 percent of the relevant judicial proceedings involving the government. Case loads have been increasing in recent years at a rate of approximately 15 percent per year. This rate of increase has been applied to the 1979 base case load in projecting the number of cases affected by the bill.

The number of administrative adjudications for which awards would be made was based on preliminatry estimates for 1978 from the Administrative Conference of the United States. Approximately 240,000 cases were terminated in 1978 after review by an administrative law judge. The number of administrative adjudications that the government loses is estimated to be 45 percent of the total, larged based on Social Security Administration cases which account for about 90 percent of the total and experience a loss rate of between 40 and 50 percent. Employing the same award rate (25 percent) as was used for judicial proceedings, it was estimated that awards would have been made in approximately 31,050 administrative cases in 1979, again increased by 15 percent per year over the projection period.

Awards

The estimated average award for judicial proceedings, excluding tax cases, was based on two surveys of awards in cases involving Title VII actions, Freedom of Information and Privacy Act litigations in 1977. The average award in these cases was approximately $16,000 for attorney fees. This amount was assumed to apply to all of the judicial cases estimated above, except tax cases. In addition to attorney fees, it was assumed that an award would be made for other costs incurred, such as expert witness, fees, the cost of the party's absence from work, costs of studies or reports, and any other costs deemed necessary for the support of the case. This additional amount was assumed to be $2,200, increased each year by the CBO projection of the consumer price index (CPI). Average awards in tax cases were estimated to be $10,000 for cases in the District Court, and $25,000 in the Court of Claims and the Appeals Court, also increased by the projection of the CPI. The total cost for all judicial proceedings was therefore estimated to be approximately $54 million in fiscal year 1981, increasing to $74 million in fiscal year 1983.

The awards for administrative adjudications for all types of cases were estimated to be $2,000 on average for attorney's fees and $200 for other costs. Other costs were assumed to increase annually by the CBO projection of the increase in the CPI. The total cost for administrative adjudications was estimated to be $92 million in fiscal year 1981, increasing to $124 million in fiscal year 1983, based on historical caseload levels.

Additional impact of bill

The costs derived above were increased by 5 percent in 1981, 10 percent in 1982, and 15 percent in 1983, to reflect the reporting requirements specified in the bill and the impact that enactment of this bill would have on the size of awards and the number of cases. This was done for two reasons. First, since the government must show substantial justification for its actions, more time and money is expected to be spent by the government and private attorneys in establishing whether an award will be made. Second, since the bill states that "it is the purpose of this Act to diminish the deterrent effect of seeking review of, or defending against, governmental action . . .", case loads in both judicial and administrative proceeds are expected to increase faster than the historical rate by virtue of the existence of this legislation.

7. Estimate comparison: None.

8. Previous CBO estimate: On July 18, 1979, CBO prepared a cost estimate for S. 265, a similar bill ordered reported by the Senate Committee on the Judiciary. This estimate differs from the previous one primarily because it is based on more recent and more complete data on the number of administrative adjudications, resulting in a substantially higher estimate of awards for that purpose.

9. Estimate prepared by: Kathy Weiss.

10. Estimated approved by:

C. G. NUCKOLS,
For James L. Blum,
Assistant Director for Budget Ananlysis.

No oversight findings or recommendations have been made by the Committee on Government Operations with respect to the subject matter contained in H.R. 6429.

In compliance with clause 2(l)(4) the committee concludes that the provisions of this legislation in and of themselves will have no inflationary impact on prices and costs in the operation of the national economy.

In compliance with clause 7, rule XIII of the House of Representatives, the committee makes the following statement:

> The costs attributable to this bill for the current fiscal year and for fiscal years 1981–85 are as follows:
>
> Your committee does not quarrel with the $594 million cost estimate supplied by the Congressional Budget Office, but it appears that the CBO avoided the deterrent to unreasonable actions the committee believes will occur. The figures supplied by the Congressional Budget Office assume that the Federal Government will continue to bring unjustified actions against small businesses and individuals instead of being more selective in the actions it brings. If on the other hand the current

> pattern continues, it is only right that the Government pay the cost of wrongfully bringing legal actions. Finally, your committee stresses that such payments will not require the appropriation of additional funds because any such payments are directed to be absorbed by the offending department or agency.
>
> Your committee has not received a cost estimate on H.R. 6429 from any Government agency but we were advised that the estimate of the Congressional Budget Office reflects input from the Department of Justice.

In your committee's opinion, the above statements fully comply with the Rules of the House of Representatives.

SECTION-BY-SECTION ANALYSIS

TITLE I—SMALL BUSINESS ADMINISTRATION, OFFICE OF ADVOCACY

Section 101 amends title II of Public Law 94–305 by adding new subsection (11) to section 202 and by adding a new section 207 and reunmbering the remaining sections.

New subsection (11) requires the Office of Advocacy of the Small Business Administration to advise, cooperate with, and consult with the Attorney General of the United States, Federal agencies, and the Chairman of the Administrative Conference to facilitate relief afforded under this act.

New section 207 requires the Chief Counsel for Advocacy to submit a report to the President and to Congress every 2 years on (1) the number, character, and dollar value of cost and fee awards paid pursuant to this act; (2) the time period between the initiation of the formal action upon which costs and fees were awarded to a small business and the award and payment of costs and fees to the small business; (3) the number of instances where a Federal agency appealed the award of costs and fees under this act; and, (4) an assessment of whether this act has caused expeditious resolution of small business disputes with Federal agencies.

TITLE II—SMALL BUSINESS EQUAL ACCESS TO JUSTICE

Section 201 contains a statement of the congressional findings and the purposes of the bill.

Subsection (a) finds that certain individuals and organizations may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved.

Subsection (b) finds that because of the resources and expertise of the Federal Government, the standard for awarding fees should be different than the one applied in nongovernmental litigation.

Subsection (c) states that the purpose of the act is to diminish the deterrent effect of seeking review, or defending against, unreasonable governmental action by authorizing an award of attorney fees and other costs.

Subsection (d) states that an additional purpose is to insure an exception to the "American rule" regarding attorney fees in actions by or against the United States.

Section 202 of the bill amends chapter 5 of title 5, United States Code, by adding new section 504, to provide for an award of reasonable fees and expenses to prevailing parties in agency adjudications under section 554 of title 5, sections 204 or 401 of title 39, or section 605 of title 41.

Under the proposed section 504(a) of title 5, a party with a direct and personal interest other than the United States who prevails in an agency adjudication is entitled to reasonable fees and other expenses unless the agency finds that the position of the agency as a party to the proceedings was susbtantially justified or that special circumstances make an award unjust. The agency may reduce the amount to be awarded, or deny an award, to the extent that the private party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the resolution of the matter in controversy.

It also defines terms used in the section.

Under the proposed section 504(b), "fees and other expenses" include the reasonable fees of attorneys and expert witnesses, the cost of any report, study, or test which is found by the agency to be reasonably necessary to the party's case, as well as the cost of the party's personal absence from business at an hourly rate. The amount of fees awarded shall be based on the prevailing market rates for the kind and quality of the services furnished except that attorney fees are limited to a maximum of $80 per hour unless special factors justify a higher fee.

"Party" means those individuals who are defined as "persons" under section 551 of title 5 who have a personal interest in the case, except it excludes those individuals whose net worth exceeded $1 million and it also excludes sole owners of unincorporated businesses, partnerships, corporations, and associations, including cooperative associations as defined in the Agricultural Marketing Act (42 U.S.C. 1141j (a)) whose net worth exceeded $5 million at the time the adjudication was initiated.

"Adjudication" excludes any adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license.

The proposed section 504(b)(2) incorporates by reference the definitions of section 551 of title 5.

The proposed section 504(c)(1) directs each agency in cooperation with the Chairperson of the Administrative Conference to establish rules governing the procedure for awarding fees. It further specifies that where the underlying adjudication is reviewed by a court, an award shall be made under 28 U.S.C. 2412(d)(3), a new section added by this act.

The proposed section 504(c)(2) provides that a party who is dissatisfied with an agency decision regarding attorney's fees may petition for leave to appeal to the U.S. court which would have jurisdiction to review the merits of the underlying decision. Review by the court is discretionary and a denial of a petition for leave to appeal is not reviewable. If a petition is granted, the court may reverse or modify the fee determination if it finds that the agency's determination was not substantially justified based upon a de novo review of the record.

The proposed section 504(d) provides that awards will be paid out of the budget of the agency involved and also specifies that no additional funds may be appropriated to cover the costs of fee awards.

The proposed section 504(e) directs the Administrative Conference of the United States to report annually regarding the number and amount of fee awards under this section.

Section 202(b) of the bill amends the table of contents to reflect the addition of section 504.

Section 202(c) of the bill repeals section 504 of title 5 at the end of 3 years.

AWARD OF ATTORNEY FEES AND OTHER EXPENSES IN CERTAIN JUDICIAL PROCEEDINGS

Section 203(a) of the bill amends section 2412 of title 28, United States Code, by adding new provisions regarding the award of attorney fees and other expenses in certain judicial proceedings.

The proposed section 2412(a) preserves the law of existing section 2412 which provides for a discretionary award of costs in any civil action brought by or against the United States except attorney fees and related costs.

The proposed section 2412(b) permits a court in its discretion to award attorney fees and other expenses to private parties in civil litigation involving the United States to the same extent it may award fees in cases involving private parties.

The proposed section 2412(c)(1) incorporates language found in existing section 2412 which establishes that judgments for costs are to be paid as provided for in sections 2414 and 2517 of title 28.

The proposed section 2412(c)(2) establishes that fees and other expenses under subsection (b) are to be paid in the same manner as costs unless the award is based upon a finding that the United States acted in bad faith. In those circumstances, the award is to be paid by the governmental entity found to have acted in bad faith.

The proposed section 2412(d) authorizes an award of reasonable fees and other expenses in judicial proceedings analogous to the awards authorized in agency adjudications under section 202 of this act.

The proposed section 2412(d)(1) provides that a private party in certain civil actions brought by or against the United States is entitled to reasonable fees and other expenses unless the Government action was substantially justified or other circumstances make an award unjust. The subsection applies to all civil actions except tort actions and those already covered by existing fee-shifting statutes.

The proposed section 2412(d)(2) defines terms which apply to this subsection. The definitions of "fees and other expenses" and "party" are explained under section 202(a) of this act.

The proposed section 2412(d)(3) provides that a court may award fees and other expenses to a private party upon judicial review of an agency adjudication, and shall include in the award the fees and other expenses for services performed during the administrative proceedings unless the court finds that during such proceedings the position of the United States was substantially justified or that special circumstances make an award unjust.

The proposed section 2412(d)(4) established that awards under this subsection will be paid by the agency involved and specifies that no additional funds may be appropriated to cover the costs of fee awards.

The proposed section 2412(d)(5) directs the Administrative Office of the U.S. Courts to report annually regarding the number and amount of fee awards under this subsection.

Section 203(b) of the bill conforms the item relating to section 2412 in the table of sections for chapter 161 of title 28.

Section 203(c) of the bill repeals subsection (d) of section 2412 of title 28 at the end of 3 years.

Section 204(a) of the bill deletes subdivision (f) of rule 37 of the Federal Rules of Civil Procedure.

Section 204(b) of the bill conforms the table of contents of the Federal Rules of Civil Procedure.

Section 204(c) deletes the existing language regarding awards of fees under title 12, United States Code, section 1988.

Section 205 of the bill provides that nothing contained herein shall affect any other provision of law which authorizes the awarding of fees to any party other than the United States.

Section 206 of the bill provides that these amendments shall apply to any adjudication or civil action pending on the effective date or commenced after the effective date of this act.

Section 207 requires the Office of the Chairman of the Administrative Conference of the United States and the Director of the Administrative Office of the U.S. Courts to provide to the Small Business Administration's Office of Advocacy the information required to be collected under title I of this bill.

Section 208 provides that the effective date of this act is October 1, 1980.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

PUBLIC LAW 94-305

AN ACT to amend the Small Business Act and Small Business Investment act of 1958 to provide additional assistance under such Acts, to create a pollution control financing program for small business, and for other purposes.

* * * * * * *

TITLE II—STUDY OF SMALL BUSINESS

* * * * * * *

STUDY

SEC. 202. The primary functions of the Office of Advocacy shall be to—

(1) * * *

* * * * * * *

(9) recommend specific measures for creating an environment in which all businesses will have the opportunity to complete effectively and expand to their full potential, and to ascertain the common reasons, if any, for small business successes and failures; [and

[(10) determine the desirability of developing a set of rational, objective criteria to be used to define small business, and to develop such criteria, if appropriate.]

(10) determine the desirability of developing a set of rational, objective criteria to be used to define small business, and to develop such criteria, if appropriate; and

(11) advise, cooperate with, and consult with the Attorney General of the United States, Federal agencies, and the Chairman of the Administrative Conference, in order to facilitate collective relief afforded to small businesses under the Small Business Equal Access to Justice Act.

* * * * * * *

REPORTS ON FEE AND COST AWARDS

SEC. 207. The Chief Counsel for Advocacy, not later than March 31, 1981, and every two years thereafter, shall submit a report to the President and to the Congress on—

(1) the number, character and dollar value of cost and fee awards paid to small businesses pursuant to the Small Business Equal Access to Justice Act;

(2) the time period between the initiation of the formal action upon which costs and fees were awarded to a small business, the award of such costs and fees and the payment to the small business of such costs and fees;

(3) the number of instances where a Federal agency appealed the award of costs and fees under such Act; and

(4) an assessment of whether such Act has caused expeditious resolution of small business disputes with Federal agencies.

AUTHORIZATION

SEC. [207] *208.* There are authorized to be appropriated not to exceed $1,000,000 to carry out the provisions of this title. Any sums so appropriated shall remain available until expended.

TECHNICAL AMENDMENT

SEC. [208] *209.* Section 5(e) of the Small Business Act is hereby repealed.

TITLE 5, UNITED STATES CODE

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PART I—THE AGENCIES GENERALLY

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CHAPTER 5—ADMINISTRATIVE PROCEDURE

SUBCHAPTER I—GENERAL PROVISIONS

SEC.
500. Administrative practice; general provisions.
501. Advertising practice; restrictions.
502. Administrative practice; Reserves and National Guardsmen.
503. Witness fees and allowances.
504. Costs and fees of parties.

* * * * * * *

§ 504. Costs and fees of parties

(a) An agency, or the United States Postal Service, that conducts an adjudication subject to section 554 of this title, sections 204 or 401 of title 39, or section 605 of title 41 shall award, to a party with a direct and personal interest other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency as a party to the proceedings was substantially justified or that special circumstances make an award unjust. The adjudicative officer of the agency may reduce the amount to be awarded, or deny an award, to the extent that the private party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy. The decision of the agency under this section shall be made a part of the record and shall include written findings and conclusions and the reason or basis therefor.

(b) (1) For the purposes of this section—

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the cost of any study, analysis, engineering report, test, or project which is found by the adjudicative officer of the agency to be reasonably necessary for the preparation of the party's case, the cost of the party's personal absence from business at an hourly rate, reasonable attorney or agent fees and other reasonable and necessary costs directly related to the party's case. The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert shall be compensated at a rate in excess of the highest rate or compensation for experts paid by the agency involved; and (ii) attorney fees shall not be awarded in excess of $80 per hour unless the agency determines by regulation that an increase in the cost of living or special factors, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee;

(B) "party" means a "person" as defined in section 551 of this title, who has a personal interest in the case, but excludes any individual whose net worth exceeded $1,000,000 at the time the adjudication was initiated, and any sole owner of an unincorporated business, or any partnership, corporation, association, including a cooperative association as defined in the Agricultural Marketing Act (12 U.S.C. 1141j(a)) or organization whose net worth exceeded $5,000,000 at the time the adjudication was initiated;

(C) "adjudication subject to section 554 of this title, section 204 of title 39, or section 601 of title 41" does not include adjudication for the purposes of establishing or fixing a rate or for the purposes of granting or renewing a license; and

(D) adjudicative officer means the official of the agency, whether designated as an administrative law judge or hearing officer or otherwise, who presided at the adjudication.

(2) Except as otherwise provided in paragraph (1), the definitions provided in section 551 of this title apply to this section.

(c)(1) After consultation with the Chairman of the Administrative Conference, each agency shall by rule establish uniform procedures for the submission and consideration of applications for an award of fees and other expenses. If a court reviews the underlying decision of the agency adjudication, an award for fees and other expenses may be made only pursuant to section 2412(d)(3) of title 28.

(2) A party dissatisfied with the fee determination by the agency may petition for leave to appeal to the court of the United States having jurisdiction to review the merits of the underlying decision of the agency adjudication. If the court denies the petition for leave to appeal, no appeal may be taken from the denial. If the court grants the petition, it may modify the determination of the agency if it finds that the failure to make an award, or the calculation of the amount of the award, was not substantially justified based upon a de novo review of the record.

(d) Fees and other expenses awarded under this section shall be paid by the particular agency from any sums appropriated to such agency, except that no sums may be appropriated to any such agency specifically for the purpose of paying fees and other expenses awarded under this section.

(e) The Office of the Chairman of the Administrative Conference of the United States shall report annually to the Congress on the amount of fees and other expenses awarded during the preceding fiscal year pursuant to this section. The report shall describe the number, nature, and amount of the awards, the claims involved in the controversy and any other relevant information which may aid the Congress in evaluating the scope and impact of such awards. Each agency shall provide the Conference with such information as is necessary for the Chairman to comply with the requirements of this subsection.

* * * * * * *

TITLE 28, UNITED STATES CODE

* * * * * * *

CHAPTER 161—UNITED STATES AS PARTY GENERALLY

Sec.
2401. Time for commencing action against United States.
2402. Jury trial in actions against United States.
2403. Intervention by United States or a State; constitutional question.
2404. Death of defendant in damage action.
2405. Garnishment.
2406. Credits in action by United States; prior disallowance.
2407. Delinquents for public money; judgment at return term; continuance.
2408. Security not required of United States.
2409. Partition action involving United States.
2409a. Real property quiet title actions.
2410. Actions affecting property on which United States has lien.
2411. Interest.
2412. Costs *and fees*.
2413. Executions in favor of United States.
2414. Payment of judgments and compromise settlements.
2415. Time for commencing actions brought by the United States.
2416. Time for commencing actions brought by the United States—Exclusions.

* * * * * * *

§ 2412. Costs

[Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action. A judgment for costs when taxed against the Government shall, in an amount established by statute or court rule or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by him in the litigation. Payment of a judgment for costs shall be as provided in section 2414 and section 2517 of this title for the payment of judgments against the United States.]

§ 2412. Costs and fees

(a) Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, but not including fees and other expenses of attorneys, may be awarded to the other party in any civil action brought by or against the United States or any agency or department, including the United States Postal Service, or official of the United States acting in his official capacity in any court having jurisdiction of such action. A judgment for costs when taxed against the Government shall, in an amount established by statute, court rule, or order, be limited to reimbursing in whole or in part the other party for the costs incurred by him in the litigation.

(b) In addition to the costs which may be awarded pursuant to subsection (a) and unless otherwise specifically prohibited, a court may award reasonable attorney fees to the private party in any civil action brought by or against the United States or any agency, department or official of the United States acting in his official capacity, or the United States Postal Service, and the United States shall be liable to

the same extent that a private party would be liable under the common law or under the terms of any statute which specifically provided for such an award.

(c) (1) Any judgment against the United States or any agency or official of the United States acting in his official capacity for fees and other expenses pursuant to subsection (b) shall be paid as provided in sections 2414 and 2517 of this title and shall be in addition to the compensation, if any, awarded in the judgment.

(2) Any judgment against the United States or any agency or official of the United States acting in his official capacity for fees and other expenses pursuant to subsection (b) shall be paid as provided in sections 2414 and 2517 of this title unless the basis for the award is a finding that the United States acted in bad faith, in which case the award shall be paid by the agency found to have acted in bad faith and shall be in addition to the compensation, if any, awarded in the judgment.

(d) (1) In addition to the costs which may be awarded pursuant to subsection (a) and except as otherwise specifically provided by statute, a court shall award fees and other expenses to any party other than the United States which in any civil action (other than cases sounding in tort) brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust. The court, in its discretion, may reduce the amount to be awarded pursuant to this subsection, or deny an award, to the extent that the private party, during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy. A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application which provides evidence of such party's eligibility for the award and the amount sought, including an itemized statement from attorneys and experts stating the actual time expended in representing such party and the rate at which fees were computed.

(2) For the purposes of this subsection—

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the cost of any study, analysis, engineering report, test, or project which is found by the court to be reasonably necessary for the preparation of the party's case, the cost of the party's personal absence from business at an hourly rate, reasonable attorney fees and other reasonable and necessary costs related to the party's case. The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert shall be compensated at a rate in excess of the highest rate of compensation for experts paid by the United States; and (ii) attorney fees shall not be awarded in excess of $80 per hour unless the court determines that an increase in the cost of living or special factors, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee;

(B) "party" means any individual whose net worth is less than $1,000,000 at the time the civil action was filed, any sole owner of

an unincorporated business, or any partnership, corporation, association, including a cooperative association as defined in the Agricultural Marketing Act (12 U.S.C. 1141j(a)) or organization whose net worth was less than $5,000,000 at the time the civil action was filed; and

(C) "United States" includes any agency, and any official of the United States acting in his official capacity.

(3) In awarding fees and other expenses under this subsection to a private party in any action for judicial review of an agency adjudication conducted pursuant to section 554 of title 5, the court shall include in the award, the fees and other expenses for services performed during the administrative proceedings unless the court finds that during such proceedings the position of the United States was substantially justified, or that special circumstances make an award unjust.

(4) Fees and other expenses awarded under this subsection shall be paid by the particular agency from any sums appropriated to such agency, except that no sums may be appropriated to any such agency specifically for the purpose of paying fees and other expenses awarded under this section.

(5) The Director of the Administrative Office of the United States Courts shall include in its annual report prepared pursuant to section 604 of this title, the amount of fees and other expenses awarded during the preceding fiscal year pursuant to this subsection. The report shall describe the number, nature, and amount of the awards, the claims involved in the controversy and any other relevant information which may aid the Congress in evaluating the scope and impact of such awards.

* * * * * * *

FEDERAL RULES OF CIVIL PROCEDURE

* * * * * * *

Rule. 37. Failure to Make Discovery: Sanctions
- (a) Motion for order compelling discovery.
  - (1) Appropriate court.
  - (2) Motion.
  - (3) Evasive or incomplete answer.
  - (4) Award of expenses of motion.
- (b) Failure to comply with order.
  - (1) Sanctions by court in district where deposition is taken.
  - (2) Sanctions by court in which action is pending.
- (c) Expenses on failure to admit.
- (d) Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection.
- (e) Subpoena of person in foreign country.
- [(f) Expenses against United States.]

* * * * * * *

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Rule 37. Failure to Make Discovery: Sanctions

(a) Motion for order compelling discovery

A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) * * *

* * * * * * *

[(f) Expenses against United States]

[Except to the extent permitted by statute, expenses and fees may not be awarded against the United States under this rule.]

* * * * * * *

Section 722 of the Revised Statutes

Sec. 722. The jurisdiction in civil and criminal matters conferred on the district and circuit courts by the provisions of this Title, and of Title "Civil Rights," and of Title "Crimes," for the protection of all persons in the United States in their rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, title IX of Public Law 92-318, [or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code,] or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.".

ADDITIONAL VIEWS OF HON. JOHN J. LaFALCE

As one of the cosponsors of the Small Business Equal Access to Justice Act, I wish to voice my support for the principles embodied in H.R. 6429. Title II of this bill will provide needed relief to small business concerns and individuals who successfully resist unreasonable government action by reimbursing them for their expenses including fees. This provision is virtually identical to a measure which I introduced in the last Congress (H.R. 11224). Such reform is long overdue and it is clear to me that the time is right for the Congress to provide the necessary relief for those who are lacking the necessary resources to effectively resist improper governmental conduct.

The concept of this bill is something that has been endorsed by the Administration and by the Department of Justice. However, the particular wording of the bill has been vigorously opposed by the Department of Justice.

I, too, am concerned about several provisions in the bill which I believe will be unduly burdensome and which will likely promote both uncertainty and an additional layer of litigation. My principal concern is that the bill's standard for awarding attorneys fees requires an agency (or court where appropriate) to award expenses unless it finds that the government's position was "substantially justified or that special circumstances make an award unjust." I am concerned that this provision is too subjective and insufficiently precise to provide the necessary guidance to ensure consistent application by the courts and agencies. It invites the decision maker to either second guess or to apply his or her subjective judgment as to what is justified. Further, I am concerned, because of the lack of certainty, that this provision will be the subject of a significant amount of litigation as to its interpretation, and thereby, unduly prolong many law suits to the detriment of the parties and our system of justice.

I also express concern over two other provisions, which in addition to the standard of proof, I do not believe were intended by the authors of this legislation when we started out. First, the bill mandates that a court (or agency) award a fee. I believe we should give the courts (or agencies) some discretion to deny a fee award. I would expect that once it has been determined that the government has violated the standard, the court (or agency) would ordinarily award reasonable fees. In unusual circumstances, however, it may be unjust to award fees. Although it is not likely that a court (or agency) would often deny a fee award, it ought to be provided with the discretion to do so.

Second, the bill places the burden on the government to indicate its own conduct of lawsuits, thereby creating a questionable, and possibly dangerous, presumption that the government's decision to bring a lawsuit was unjustified in suits it loses. In carrying its burden of persuading the judge that its decision was substntially justified, the government, in each case it lost, would be required to come forward with evidence to defeat an award of attorney fees. It is unsound public policy and legal procedure to impose this burden absent a finding of misconduct.

A presumption arises in the law either because of the probability that the presumed fact is true when the facts on which it is based are established, or because of the difficulties in proving the presumed fact. The presumption that the position of the government was not substantially justified when it loses, is not based on either of these factors. In fact, there has existed throughout our history a common law presumption that supports a contrary conclusion—public officials perform their duties lawfully and in good faith. This presumtion is an integral part of the body of case law governing Federal administrative and official actions. H.R. 6429 would have the effect of setting aside two centuries of practice and would overrule this common law presumption.

I think that it is imperative, if we are to authorize the relief this bill seeks to provide, that we do so in as concise and precise a fashion as possible. By doing so we will ensure that the agencies, courts and litigants will clearly understand what we intend to accomplish. Further, I believe we must be careful to avoid any measure that will itself breed additional litigation.

Accordingly, I proposed amendments to H.R. 6429 to avoid the problems noted above and yet, still accomplish our objective of providing the wherewithal to resist unreasonable government conduct. Each of the amendments had the strong backing of the Department of Justice. The first amendment would have brought H.R. 6429 more in line with the Department's own bill, H.R. 7208. However, that amendment was defeated by the Small Business Committee. Next, instead of offering two other amendments which represented narrower versions of my first amendment, I offered an amendment which represented, I was advised, the irreducible minimum that would be required in order to obtain the approval of the Department of Justice.

I proposed to change the standard of proof required by the government from "substantially justified" to the standard enunciated by the Supreme Court, and as interpreted and applied on numerous occasions by the courts with little or no dispute as to its meaning: unless the government shall prove that its action was "neither arbitrary, frivolous, unreasonable, or groundless."

This language is taken from the Supreme Court in the case of *Christiansburg Garment Co.* v. *E.E.O.C.*, 424 U.S. 412 (1978) which established a standard for certain types of fee awards in Civil Rights cases when the action of the opposing party was "frivolous, unreasonable, or groundless." It seems to me that the purpose of H.R. 6429 is to deter unreasonable government conduct. Indeed, that is precisely what the bill provides in section 201(c)(1). The standard I proposed will accomplish everything that H.R. 6429 is intended to accomplish and will avoid uncertainty, inconsistent application, and an excessive amount of litigation concerning its interpretation. However, this amendment was also defeated by the Small Business Committee.

In conclusion, I am sure that my colleagues in the House will agree with me that our effort to provide needed relief to those who are unable to effectively resist unreasonable government conduct should not be impeded by a provision that carries with it significant adverse effects incident to its interpretation.

In the past, by authorizing the award of attorney fees and other expenses in certain instances, we have encouraged private citizens to advance the interest of specific, important social goals. For example, we have authorized the award of attorney fees in cases brought pursuant to the Civil Rights Act, the Freedom of Information Act, and the Consumer Product Safety Act. H.R. 6429 represents a dramatic departure from our previous, categorical approach. Bearing this in mind, I believe that the *Christiansburg Garment* standard is much better suited to solving the problem H.R. 6429 seeks to remedy.

I, therefore, urge my colleagues to carefully consider this issue to ensure that any bill we approve will accomplish the ends we are seeking without creating unnecessary additional burdens for the agencies, courts and litigants.

I also encourage my colleagues to consider an approach that will obtain the approval of the Department of Justice so as to avoid a veto of this bill. In striving for passage of this bill in its present form, we may well be ensuring that it never becomes enacted.

John J. LaFalce.

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LEGISLATIVE HISTORY
OF THE
EQUAL ACCESS TO JUSTICE ACT

THE ACT

Equal Access to Justice Act, Pub. L. No. 96-481, Title II, 94 Stat. 2321, 2325; enacted on October 21, 1980, by the 96th Congress, Second Session; effective October 1, 1981.

REPORTS

1. H.R. Conf. Rep. No. 96-1434, 96th Cong., 2d Sess. ordered to be printed by the Committee of Conference on September 30, 1980, to accompany H.R. 5612.

2. S. Rep. No. 96-253, 96th Cong., 1st Sess. ordered to be printed by the Senate Committee on the Judiciary on July 20, 1979, to accompany S. 265.

3. H.R. Rep. No. 96-1418, 96th Cong., 2d Sess. ordered to be printed by the House Committee on the Judiciary on September 26, 1980, to accompany S. 265.

4. H.R. Rep. No. 96-1005, pt. I, 96th Cong., 2d Sess. ordered to be printed by the House Committee on Small Business on May 16, 1980, to accompany H.R. 6429.

HEARINGS

5. Senate Hearings before the Committee on the Judiciary, 96th Cong., 1st Sess., February 13 and 27, 1979.

6. Senate Hearings before the Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, 96th Cong., 1st Sess., April 19, 20 and 21, 1979 (on S. 265).

7. House Hearings before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the Committee on the Judiciary, 96th Cong., 2d. Sess., May 20 and June 24, 1980 (on S. 265).

8. House Hearings before the Subcommittee on SBA and SBIC Authority and General Small Business Problems of the Committee on Small Business, 96th Cong., 2d. Sess., April 17, 23 and May 1, 1980 (on H.R. 5103 and H.R. 6429).

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125 CONG. REC. (1979)

9. S886-S892 (daily ed. January 31, 1979); Remarks by Senator Domenici upon introduction of S. 265.

10. S10911-S10926 (daily ed. July 31, 1979); Senate consideration, amendment, and passage of S. 265.

126 CONG. REC. (1980)

11. S.13685-S13691 (daily ed. September 26, 1980); Senate consideration and passage of H.R. 5612 with amendment that incorporated the basic provisions of S. 265 as reported to the House.

12. H9832 (daily ed. September 29, 1980); House disagreement with the Senate amendment to H.R. 5612 and agreement to a conference with the Senate

13. H10001-H10002 (daily ed. September 30, 1980); Comment by Representative Kastenmeier on H.R. 5612 and S. 265.

14. H10013 (daily ed. September 30, 1980); Comment by Representative Boner on H.R. 5612 and S. 265.

15. E4642 (daily ed. September 30, 1980); Remarks by Representative Udall in support of S. 265.

16. H9993-H10001 (daily ed. September 30, 1980); Committee of Conference report on H.R. 5612 filed.

17. S13873-S13876 (daily ed. September 30, 1980); Senate consideration and approval of the Committee of Conference report on H.R. 5612.

18. S14089 (daily ed. September 30, 1980); Senate consideration and passage of S. Con. Res. 134 to authorize the corrections in the enrollment of H.R. 5612.

19. S14089-S14091 (daily ed. September 30, 1980); Senate introduction, consideration and passage of S. 3186 (identical to S. 265).

20. H10213-H10231 (daily ed. October 1, 1980); House consideration, amendment and passage of H.R. 5612.

21. S14210-S14215 (daily ed. October 1, 1980); Senate consideration and passage of H.R. 5612 as amended by the House.

22. H588 (daily ed. February 5, 1980); Remarks by Representative McDade upon the introduction of H.R. 6429.

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MISCELLANY

23. 16 Weekly Compilation of Presidential Documents 2381-2382 (October 27, 1980); Statement of the President on October 21, 1980, upon signing into law H.R. 5612.

RELATED MATTERS

24. H.R. 7208, introduced by Representative Rodino (by request) and referred to the Committee on the Judiciary on April 29, 1980.

25. H.R. 4584, introduced by Congressman Corman and referred to the House Committee on Ways and Means, on June 21, 1979.

26. S. 1444, introduced by Senator Baucus and referred to the Senate Committee on Finance on June 27, 1979. 125 Cong. Rec. S8712-S8715 (daily ed. June 27, 1979).

27. Hearing before the Subcommittee on Select Revenue Measures of the Committee on Ways and Means, House of Representatives, 96th Cong., 2d. Sess.; on H.R. 4584 and similar bills to authorize payment of attorneys' fees to taxpayers who prevail in tax litigation against the federal government.

28. Hearing before the Subcommittee on Oversight of the Internal Revenue Service of the Committee on Finance, United States Senate, 96th Cong., 1st Sess.; on S1444, a bill to amend the Internal Revenue Code of 1954 and Title 28 of the United States Code to provide for the award of reasonable court costs, including attorney's fees, to prevailing parties in civil tax actions, and for other purposes.

October 5, 1981

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Applicability of Equal Access to Justice Act to Tax Court Proceedings

The Equal Access to Justice Act 1/ ("the Act") amended the Judicial Code to permit the award of attorney's fees and other expenses to prevailing parties in civil litigation involving the United States. 2/ The Act revised section 2412 which incorporates section 1920. These two sections have referred to court fees and costs, since the Judicial Code was revised and codified in 1948. The question presented is whether the United States Tax Court has the authority to make such awards under the Act. The position of the Internal Revenue Service, based on the Act, two widely-cited Tax Court opinions, and legislative history, is that the Act does not authorize the Tax Court to award costs, attorney's fees and other expenses.

The pertinent provisions of the Act are as follows:

"§2412. Costs and fees

> "(a) Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, [28] but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency and any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. A judgment for costs when taxed against the United States shall, in an amount established by statute, court rule, or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation.
>
> "(b) Unless expressly prohibited by statute a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought

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1/ Title II of P.L. 96-481.

2/ It also amended 5 U.S.C., not pertinent herein.

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by or against the United States or any agency and any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

"(c)(1) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for costs pursuant to subsection (a) shall be paid as provided in sections 2414 and 2517 of this title and shall be in addition to any relief provided in the judgment.

"(2) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for fees and expenses of attorneys pursuant to subsection (b) shall be paid as provided in sections 2414 and 2517 of this title, except that if the basis for the award is a finding that the United States acted in bad faith, then the award shall be paid by any agency found to have acted in bad faith and shall be in addition to any relief provided in the judgment.

"(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection(a), incurred by that party in any civil action (other than cases sounding in tort) brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." (emphasis added)

* * * * * * *

> "(4)(A) Fees and other expenses awarded under this subsection may be paid by any agency over which the party prevails from any funds made available to the agency, by appropriation or otherwise, for such purpose. If not paid by any agency, the fees and other expenses shall be paid in the same manner as the payment of final judgments is made in accordance with sections 2414 and 2517 of this title." (emphasis added).

As stated in section 2412(a), a court may award those "costs" enumerated in section 1920 of Title 28. Section 1920 does not define the term "court" but simply refers to "any court of the United States." That term is defined in section 451 as follows:

> "As used in this title:
> The term "court of the United States" includes the Supreme Court of the United States, courts of appeals, district courts constituted by chapter 5 of this title, including the Court of Claims, the Court of Customs and Patent Appeals, the Customs Court and any court created by Act of Congress the judges of which are entitled to hold office during good behavior."

As passed by the House of Representatives in 1948, the revised Judicial Code would have included the Tax Court in all respects, thereby placing it within the provisions of Title 28 and removing the Court from the Internal Revenue Code. The House version of the bill specifically listed the Tax Court as a "court of the United States" in section 451. As finally enacted, all references to the Tax Court in the bill were deleted in order to avoid any controversy in moving the bill to enactment. S. Rep. No. 1559, 80th Cong., 2d Sess. 2 (1948).

To date, the Tax Court remains governed by Title 26, the Internal Revenue Code. See sections 7441 through 7448. It is created under Article I of the U.S. Constitution I.R.C. section 7441. Its judges hold office for a term of 15 years. I.R.C. section 7443(e). "Courts of the United States" are created under Article III of the Constitution, judges of which are entitled to hold office during good behavior. See 28 U.S.C. section 451. Prior to 1969 the Tax Court was an independent agency of the

Executive Branch. See S. Rep. No. 91-552, 91st Cong., 1st Sess. (1969); 1969-3 C.B. 423, 615. Nothing in the 1969 legislation granted the Court any authority under the Judicial Code.

In Sharon v. Commissioner, 66 T.C. 515 (1976) the taxpayers sought to invoke sections 2412 and 1920 of the Judicial Code to recover as "costs," their Tax Court petition filing fees. In holding that their reliance on those two sections was "misplaced," the Court stated

> "[t]hose sections apply only to courts 'the judges of which are entitled to hold office during good behavior.' See 28 U.S.C. sec. 451 (1970 ed.). The United States Tax Court was consciously excluded from that definition of a court. S. Rept. No. 1559, to accompany H.R. 3214, 80th Cong., 2d Sess. 2 (1948)." id., 534. 3/

In Key Buick v. Commissioner, 68 T.C. 178 (1977) the Tax Court denied the taxpayer's motion for attorney's fees under the so-called Allen amendment to 42 U.S.C. § 1988 4/ which permitted district courts to award such fees in tax proceedings brought by the United States. In all Tax Court proceedings the action is brought by the taxpayer. Thus the Court concluded the statute had no applicability to the Tax Court. In addition, the Court noting that the statute provided for the award of fees "as part of the costs," concluded, "[t]his Court has no jurisdiction to allow costs to a taxpayer" id. 179, citing Sharon as authority. 5/

As noted, the Act revised section 2412 which has been in the Judicial Code since 1948. New sections 2412(b) which provides for attorney fees and 2412(d) which provides for "fees and other expenses" do not specifically refer to section 1920, which enumerates those costs which may be awarded. However, both sections 2412(b) and (d) refer to fees and costs "in addition to" those "awarded pursuant to subsection (a)." Thus the statute as revised contemplates

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3/ Also see Olick v. Commissioner, 73 T.C. 479, 490 (1979), Ellis v. Commissioner, 40 CCH Tax Ct. Mem. 267, 270 (1980), and Cox v. Commissioner, 40 CCH Tax Ct. Mem. 619, 625 (1980).

4/ The Allen amendment was deleted by the Act.

5/ On appeal, the Fifth Circuit affirmed the Tax Court's denial of the motion based on the identity of the moving party but in dictum cast doubt on the Tax Court's interpretation of its power to assess attorney fees "as cost." 613 F.2d 1306 (5th Cir. 1980).

an integrated basic scheme for the award of costs, attorney's fees and other expenses in "courts of the United States." This is reinforced by sections 2412(c)(1) and (2) and (d)(4)(A) of the Act which provide, respectively, that payment of judgments for costs pursuant to subsection (a), fees and expenses of attorneys pursuant to subsection (b), and fees and other expenses pursuant to subsection (d) are to be paid as provided in sections 2414 and 2517 of the Judicial Code. The latter two sections refer to the district courts and the Court of Claims, respectively. Again, the Tax Court is not mentioned. Similarly, sections 2412(a), (b) and (d) each refer to "any court having jurisdiction of such (that) action." It would be a strained reading of the Act to interpret this common language one way for purposes of section 2412(a) and another for purposes of sections (b) and (d). Thus it would seem anomalous to suggest that attorney fees and other expenses could be awarded by the Tax Court on the authority of sections 2412(b) and (d) if the Court has no authority to award costs under section (a). If the Tax Court is not a "court of the United States" for purposes of "costs" it would be similarly excluded for purposes of attorney's fees and other expenses.

This conclusion is confirmed by the legislative history. In the section-by-section analysis of the Act contained in H.R. Rep. No. 96-1418, 96th Cong., 2d Sess., 17 it is stated:

> "Section 2412(b) permits a court in its discretion to award attorney fees and other expenses to prevailing parties in civil litigation involving the United States to the same extent it may award fees in cases involving other parties. *The courts so empowered are those defined in section 451 of Title 28, United States Code. This is consistent with the present law in section 2412*." (emphasis added)

In addition the Congressional Budget Office analyzed drafts of the Act on three occasions. In each CBO report, the following identical language appears:

> "[a]s mandated by the bill, tort and Tax Court cases have been excluded."

S. Rep. No. 96-953, 96th Cong., 1st Sess. 10, also see p. 12; H.R. Rep. No. 96-1005, Part 1, 2nd Sess. 13; and H.R. Rep. No. 96-1418, *supra* 22.

It would appear that Congressional leaders in the 96th Congress were aware of the fact that the Equal Access to Justice Act would apply to adversary proceedings between citizens and the government including tax litigation in the U.S. district courts but that an amendment to the Internal Revenue Code would be required to provide for attorney fees in the U.S. Tax Court. One of the sponsors of the Equal Access to Justice Act, Senator Nelson, also cosponsored S. 1444, the Taxpayer Protection and Reimbursement Act. The latter was not acted upon and died in the 96th Congress. When the Act was debated and passed by the Senate, Senator Nelson said:

> "Finally, Mr. President, I believe the Senate should again provide for the awarding of attorney's fees for small business in Tax Court cases. While this bill provides for the fees to be paid in tax-related matters being heard in the U.S. district courts, it is not available in cases in the Tax Court. I have joined Senator Baucus and others in cosponsoring S. 1444, a bill to amend the Internal Revenue Code to provide for the award of reasonable attorney fees. That legislation should similarly be given rapid consideration by the Congress."

Cong. Record, July 31, 1979, pg. S. 10922.

S. 1444 would have amended the Internal Revenue Code to specifically provide for the award of "reasonable court costs, including attorney's fees" in "any civil action or proceeding in a court of the United States, including the Tax Court, ..."

Chief Judge of the Tax Court, Hon. C. Moxley Featherston testified before the Subcommittee on Oversight of the Internal Revenue Service of the Senate Finance Committee with regard thereto. The Court took no position on the basic policy of the proposed legislation but commented on some of the pertinent aspects of the bill. Referring to the provision for the award of "reasonable court costs" Judge Featherston's statement provides,

> "[w]e interpret this language to mean that 'court costs' other than attorney's fees are not limited to the precise items now allowable in the district courts under sections 1920 and 2412 of Title 28 of the Code. 1/"

Hearings Before the Subcommittee On Oversight of the Internal Revenue Service of the Committee on Finance 96th Cong., 1st Sess. 77 (1979) (statement of Chief Judge C. Moxley Featherston). The footnote, perhaps a reminder of the Tax Court's view of the applicability of section 1920 to its proceedings, states,

> "[t]his section does not apply to the Tax Court because the meaning of the term 'court of the United States' is restricted by 28 U.S.C. 451 to courts created under Article III whereas the Tax Court was created under Article I of the Constitution." id.

Thus, it is concluded that the Equal Access to Justice Act does not apply to proceedings in the United States Tax Court.

Steven J. Mopsick

Steven J. Mopsick
Technical Assistant to
Deputy Chief Counsel (Litigation)

IN THE UNITED STATES COURT OF CLAIMS

GENERAL ORDER NO. 1 of 1981

IT IS ORDERED, effective this date, that the Rules of the United States Court of Claims, as revised on September 1, 1969, and subsequently amended, shall be, and they are hereby, further amended in the following respects:

1. Rule 14(d) is amended to read as follows:

(d) Disqualification: (1) Standards: The trial judges of this court are subject to the standards for disqualification set by 28 U.S.C. § 455.

(2) Voluntary Disqualification: A trial judge may at any time withdraw from a case if he deems himself disqualified.

(3) Affidavit of Bias or Prejudice: (i) Whenever a party to any proceeding makes and files an affidavit that the trial judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such trial judge, if he determines that the affidavit is sufficient and timely, shall proceed no further therein, but the chief of the trial division shall assign another trial judge to hear such proceeding. The ruling of the trial judge shall be by order.

(ii) The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed as soon as practicable after the facts upon which the affidavit is based become known to the party, but not less than 10 days before a scheduled trial date, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

2. Rule 147 is amended to add a new subsection (d) as follows:

(d) Judgment in Renegotiation and Declaratory Judgment Cases: As used in these rules, the word "judgment" shall be deemed to include, but is not limited to, an order in a renegotiation case determining the amount, if any, of excessive profits, and a declaratory judgment pursuant to section 1507 of title 28, United States Code.

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3. Rule 148 is amended to read as follows:

RULE 148. FINAL JUDGMENT - FEES AND EXPENSES

(a) Applications: (1) Applications for fees and expenses pursuant to the Equal Access to Justice Act (Pub. L. No. 96-481, Title II, Oct. 21, 1980, 28 U.S.C. § 2412) shall be filed with the clerk within 30 days after the entry by the court of a final judgment for the payment of money, or for the dismissal of the petition, or of a final order in an appeal under Chapter XV, or of a final judgment as defined in Rule 147(d). Such applications and supporting statements shall be under oath. Each item shall be separately stated and supported.

(2) Except applications in an appeal under Chapter XV, applications for fees and expenses shall be referred to the trial division for action pursuant to the provisions of Rule 13(b). When appropriate, the trial division may return any such application to the court without findings of fact or recommendation. The court may refer to the trial division for appropriate action any such application in an appeal under Chapter XV.

(b) Response and Reply: Defendant shall have 30 days from the filing of an application pursuant to paragraph (a) of this rule to file a response, to which plaintiff may reply within 20 days.

(c) Proceedings: After the filing of an application, and response and reply (if any), the court or the trial judge will enter an order prescribing the procedure to be followed, either specially or pursuant to the rules of the court, or take such other action as may be deemed appropriate. A final order of the trial judge on such application shall be subject to review pursuant to Rule 54.

(d) Number of Copies: There shall be filed an original and 6 copies of applications in appeals under Chapter XV and an original and 3 copies of applications in all other cases.

4. Present Appendix B is deleted and a new Appendix B, attached to and incorporated in this order, is inserted in lieu thereof.

BY THE COURT
Daniel M. Friedman,
Chief Judge

October 1, 1981

* * * * *

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In the United States Court of Claims

No. 555–79C

(Decided September 23, 1981)

BROOKFIELD CONSTRUCTION CO., INC.,
and BAYLOR CONSTRUCTION CORP.
(A JOINT VENTURE)
v. THE UNITED STATES

John A. Kerr, attorney of record, for plaintiffs. *Hudson, Creyke, Koehler, Tacke & Bixler*, of counsel.

George M. Beasley, III, with whom was *Acting Assistant Attorney General Thomas S. Martin*, for defendant. *Raymond McCulloch*, U.S. Army Corps of Engineers, of counsel.

James A. Pemberton, Jr., for amicus curiae, Associated General Contractors; *King & King, Chartered*, of counsel.

Before DAVIS, KASHIWA and SMITH, *Judges*.

ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

DAVIS, *Judge*, delivered the opinion of the court:

The Contract Disputes Act of 1978, Pub. L. No. 95–563, 92 Stat. 2383, 41 U.S.C. 601 *et seq.* (Supp III, 1979)—in its summary transitional provision for the interim between, on the one hand, complete non-coverage by the new statute of government contracts, and, on the other, full prospective coverage for wholly new agreements made after the Act became law—presents numerous problems of interpretation.[1] These are transient, of course, but many of them are important for both contractors and Government. The present case falls into that class. It involves a pre-Act agreement and contract-claims filed with the contracting officer years before the March 1, 1979 effective date of the Act, but decided by the contracting officer after the Act went into operation. The several questions before us all concern interest on the claim-awards. The chief of these issues is whether a contractor which has elected to proceed under the Act may recover interest on its subsequently-allowed claims for periods of time prior to the effective date of the Act. We hold that the Act does not allow such retroactive interest, and that plaintiff's recovery is limited to simple, variable-rate interest running from the effective date of the Act (March 1, 1979) until December 13, 1979, the date of payment of the underlying claims.

I

The case is here on cross-motions for summary judgment, and the facts are not in dispute. Under the 1965 contract on which this action is based, plaintiff joint venture[2] agreed to construct a hurricane barrier for the United States Army Corps of Engineers for the fixed price of $8,083,075. During the course of construction (April 1965-October 1968) plaintiff experienced various changes, changed conditions and suspensions of work which eventually resulted in the submission of approximately 42 claims for equitable adjustments. Most of the claims were settled and paid, and modifications issued, before March 1, 1979. As of that date, no formal decision had been issued for seven claims. Oral agreement had been reached, however, on three of these claims before the March 1st effective date, but no final modification, memorandum of understanding, or other writing had been issued at that time due to an alleged lack of program funds to pay for the settlements. Final modifications settling all of the claims were executed in October 1979, and payment was made on December 13 of that year.

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[1] This court's previous decisions on these problems include *Troup Bros. v. United States*, Ct. Cl. No. 64–79, order of Aug. 24, 1979; *Monroe M. Tapper & Assoc. v. United States*, 222 Ct. Cl. _____, 611 F.2d 354 (1979); *Warwick Constr., Inc. v. United States*. Ct. Cl. No. 85-80C, order of Aug. 29, 1980; *Wheeler Bros. v. United States*, No. 315–80C, order of Dec. 19, 1980; *Folk Constr. Co. v. United States*, Ct. Cl. No. 99–80C, order of Jan. 16, 1981; *Gregory Lumber Co. v. United States*. Ct. Cl. No. 428–80C, order of March 27, 1981; *Paragon Energy Corp. v. United States*. 227 Ct. Cl. _____, 645 F.2d 966 (1981); *Nat'l Elec. Coil v. United States*, Ct. Cl. No. 79–80C, order of March 17, 1981; *Everett Plywood Corp. v.* United States, 227 Ct. Cl. _____, _____, 651 F.2d 723, 733–34 (1981); *Tuttle/White Constructors, Inc. v. United States*, Ct. Cl. No. 205–80C, slip opinion of July 29, 1981.

[2] The joint venture is composed of Brookfield Construction Co., Inc. and Baylor Construction Corporation. We shall call it Brookfield-Baylor.

By letter of June 26, 1979, plaintiff's counsel informed defendant that it would seek interest under the Disputes Act on the amounts finally paid for all claims pending before the contracting officer on the March 1, 1979 effective date. The contract itself contained no interest provision.[3] The statutory interest claim was denied by the contracting officer in a final decision of August 28, 1979. Plaintiff timely appealed this decision and elected to proceed at once to this court under the Disputes Act's "direct access" provision, 41 U.S.C. § 609(a)(1) (Supp. III 1979). A petition was filed here in December 1979, seeking interest only. These cross-motions for summary judgment followed.

II

There is no doubt (and it is conceded) that, at least as to four of its seven claims unpaid on March 1, 1979, Brookfield-Baylor had the statutory right to proceed under the Disputes Act. Those claims were fully outstanding on that date, and no contracting officer's decision of any kind was made until a later time. Section 16 of the Act provides that:

> This Act shall apply to contracts entered into one hundred twenty days after the date of enactment [November 1, 1978]. Notwithstanding any provision in a contract made before the effective date of this Act [March 1, 1979], the contractor may elect to proceed under this Act with respect to any claim pending then before the contracting officer of initiated thereafter. [41 U.S.C. § 601 (note).]

On June 26, 1979, plaintiff made such an election.

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[3] The contract was awarded prior to the use of the standard "Payment of Interest on Contractor's Claims" clause, ASPR 7.104.82 (1972) (32 C.F.R. § 7.104–82 (1973)) which allowed interest on the amount finally determined to be due, from the date a written appeal to a board is furnished to the contracting officer until final judgment is rendered on the claim or a settlement is reached.

We begin with the most significant question in the case—whether a pre-Act contractor properly electing to proceed under the Disputes Act is entitled to interest on those pre-Act claims from the time the claims were made to the contracting officer (before the Act became effective). For its affirmative answer, plaintiff rests, first, on the proposition that, once the Act is properly invoked by a pre-Act contractor on pre-Act claims, every provision of the Act must be applied to that contractor as if this were a post-Act contract, and, second, on the Act's specific provision giving interest on claims from the time when the contracting officer receives the claim pursuant to the Act (section 12 of the Disputes Act, 41 U.S.C. § 611).[4]

The first of these contentions has already been rejected outright by the court in the broad form plaintiff (and amicus) put it. In both *Folk Construction Co.* and *Gregory Lumber Co., supra,* note 1, we refused to apply the Act's certification requirements to pre-Act claims which the contractors properly brought here under the "direct access" part of the Act.[5] Those rulings show that there can be no mechanical application of each and every provision of the Act to contractors who elect under section 16, *supra.* The purpose, scope, and meaning of the particular provision must be examined to see its reach and effect on pre-Act claims. That is what we did in *Folk* and *Gregory,* and what we must do here. This principle of specific examination is consistent with section 16, *supra,* which says no more than that the electing contractor "may elect to proceed" under the Act, and does not clamp down the precise application of any specific part of the Act to pre-Act claims or pre-Act contracts.

The inquiry then becomes one of the scope, meaning and reach of the Act's interest stipulation, section 12 (note 4, *supra*). Brookfield-Baylor invokes the "plain" language of the provision as decisively showing that, for electing contractors, interest goes back to the pre-Act time the contracting officer received the claim. But we do not find the language very helpful for the current problem. It has been said that, when section 12 declares that interest runs from the date the contracting officer receives the claims "pursuant to section 6(a)" (note 4, *supra*), this proves that interest cannot go back prior to March 1, 1979 because the whole Disputes Act, together with section 6(a), did not exist before then, and the contractor's pre-Act claims could not have been received "pursuant to section 6(a)." *Woods Hole Oceanographic Institute v. United States*, Civil Action 79–1514–MA, (D. Mass, Dec. 19, 1980), slip op. at 9. One need not accpet this point as controlling the issue of pre-Act interest in order to acknowledge that the position does show that section 12 has a definite aura of ambiguity and is not "plain" on its face in plaintiff's favor.

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[4] Section 12 provides for the payment of interest on amounts found due contractors "from the date the contracting officer receives the claim pursuant to section 6(a) from the contractor until payment thereof." Section 6(a), 41 U.S.C. § 605(a), requires that contract claims "shall be in writing and shall be submitted to the contracting officer for a decision."

[5] The full court refused to entertain both of those cases *en banc* (order of March 6, 1981, refusing rehearing *en banc* in *Folk Construction Co.*; order of March 27, 1981, refusing initial hearing *en banc* in *Gregory Lumber Co.*).

Nor is plaintiff helped by the Act's legislative history. There is no indication that Congress ever recognized that the Act could be construed as imposing pre-Act interest liability—nor any indication to the contrary. The history is wholly silent on this point. *See, generally*, S. REP. No. 95–1118, 95th Cong., 2d Sess., *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 5235 (Senate Report). Congress clearly thought that contractors should be allowed interest prospectively, but there is no expression in the history bearing, one way or the other, on the retroactive imposition of interest for periods prior to the effective date of the statute. Everything that Congress had to say bearing on interest, in its reports and debates,[6] could be the same, word for word, if the legislative intention had been to make interest awardable only for periods after the Act's effective date.

In these circumstances—almost no affirmative guidance from Congress on the issue—the weightiest factors, in our view, are these: (a) the very large liability that would be imposed on the Government, unacknowledged in the legislative history, for pre-Act statutory interest; (b) the objectives and purposes of the Act's interest provision; and (c) the traditional attitude cautioning against imposing non-constitutional interest on the Government if the mandate is not clear.

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[6] The same is true of the discussions and recommendations, on interest, of the Commission on Government Procurement.

It seems almost certain that the allowance of retroactive statutory interest (*i.e.* prior to March 1, 1979) would amount to a large additional sum.[7] Plaintiff's claims go back to the 1960's and early (or middle) 1970's. It seeks upwards of one million dollars in interest, most of it for pre-Act periods. Defendant has given us an affidavit declaring that the Corps of Engineers, alone, had some $214 million in contract claims pending against it on March 31, 1979, and that the average age of those claims might be about 2 years.[8] The Corps of Engineers is but one of many federal procurement agencies governed by the Disputes Act—and not the most important one—and we have no doubt that many of the other agencies would have comparable or greater back-logs, and a large liability for back-interest, if such interest were to be allowed.

The Supreme Court, however, has cautioned against "reading a statute to impose liability on the Federal Government, where 'the liability would mount to great sums,' unless the words (or intent) are plain." *Schellfeffer v. United States,* 170 Ct. Cl. 178, 187, 343 F.2d 936, 942 (1965), citing *Pine Hill Coal Co. v. United States,* 259 U.S. 191, 196 (1922). *See also United States v. Zazove,* 334 U.S. 602, 616–17 (1948). As we have already stressed, Congress "nowhere specified [or recognized in connection with the Disputes Act] that the United States would bear the huge cost of the enhanced liability that it would necessarily have anticipated" (*id.*) had it thought the Act had the meaning plaintiff finds there. On the contrary, the Congressional

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[7] Prior to the enactment of the Disputes Act there was no statutory provision for interest on government contract claims. A contract provision permitting interest was not adopted until 1972; and, even then, permitted interest only for the period after the contracting officer's decision was issued. *See* note 3, *supra.* This was, of course, a very limited contract provision, not at all comparable to section 12 in its scope. As we have pointed out (*see* note 3, *supra*), even that contractual interest clause was not included in plaintiff's contract which was awarded some seven years before the limited-interest clause was routinely included in government procurement contracts.

[8] Plaintiff has moved to strike this affidavit as irrelevant and inadmissible, but we deny that motion because the material in the affidavit is relevant, not in determining any fact peculiar to this case, but for the general purpose of construing the meaning of the Contract Disputes Act of 1978.

Brookfield-Baylor also moves to strike the affidavit of Raymond C. McCulloch, detailing alleged delays by plaintiff in the prosecution of its particular claims. We have not considered this affidavit because in our view the pre-Act delays for which plaintiff may or may not be responsible are irrelevant. We therefore deny the motion to strike as in effect moot because directed to an affidavit which has no part in our decision.

Budget Office stated, with reference to the costs of the Act as a whole,[9] that "it appears that no additional cost to the government would be incurred as a result of enactment of this bill." Senate Report, *supra* at 36, [1978] U.S. CODE CONG. & AD. NEWS at 5270.[10] Congress's "striking omission" to consider this "enhanced liability" "is persuasive, in the absence of cogent considerations to the contrary, that no generosity of this magnitude was contemplated." *See United States v. Zazove, supra,* 334 U.S. at 617.

The second element on which we rely is that the allowance of pre-Act interest would not serve all the significant reasons for the interest provision in section 12. True, Congress definitely thought it fair and proper to grant interest to contractors as a "legitimate cost" of performance.[11] But another essential policy for the allowance of interest was its "beneficial effect in providing additional inducement for the settlement of claims short of litigation," *Summary of the Report of the Commission on Government Procurement* 94 (1972), a primary goal behind the enactment of the Disputes Act. *See* Senate Report *supra* at 1, 1978 U.S. CODE CONG. & AD. NEWS at 5235; H.R. REP. No. 1556, 95th Cong. 2d Sess. 18 (1978) (House Report). *See also, Contract Disputes Act of 1978: Joint Hearings before the Subcommittee on Federal Spending Practices and Open Government of the Committee on Governmental Affairs and the Subcommittee on Citizens and Shareholders Rights and Remedies of the Committee on the Judiciary, United States Senate, on S. 2292, S. 2787, S. 3178,* 95th Cong. 2d Sess. 385, 390 (June 14 and 20, 1978) (letter from Honeywell Inc. recommending, *inter alia* that interest be allowed on claims from the date of submission to the contracting officer since interest would serve as a catalyst and expedite claim submission, processing, and settlement.)[12]

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[9] In reviewing the bill under section 403 of the Congressional Budget Act of 1974.

[10] Of course, interest was to be allowed prospectively, but the Congressional Budget Office may have thought that this additional prospective liability for interest would not be great in view of the bill's efforts to expedite the determination of future contract claims, as well as the existing, limited clause allowing contract interest after the contracting officer's decision (*see* notes 3, 7).

[11] Congress followed the recommendation of the Commission on Government Procurement (Vol. IV, *Report of the Commission on Government Procurement,* at 29, Recommendation 11). *See* Senate Report No. 95-1118, *supra,* at 32, [1978] U.S. CODE CONG. & AD. NEWS at 5266. We repeat that nothing in the Commission's Report or the congressional history applies this purpose to pre-Act interest, any more than the Act was applied at all to claims decided by the contracting officer prior to March 1, 1979.

This important legislative purpose of allowing interest is not facilitated in any way by awards of pre-Act interest. The specter of interest payments could not have served as a catalyst or warning to the contracting officer to expedite his proceedings as much as possible (and thus limit exposure to interest) since in pre-Act days contracting officers were not aware that any interest would have to be paid. Rather, because there was, in pre-Act times, no monetary incentive, or legal requirement, on the contracting officer to expedite his consideration of claims, the imposition of interest retrospectively would be to cast an interest burden on the Government which its officials had at the time no reason to consider, to reduce, or to guard against.

Along these same lines, we note that the Act's time limits (the dates by which certain phases of the disputes process have to be completed) were not in effect and thus could not serve as delay deterrents with respect to pre-Act claims. These deadlines were specifically included in the Act as a response to concerns over past delays in the process of resolving claims. *See* House Report, *supra* at 18. It would not further this congressional purpose (to establish deadlines for the future) to apply the interest provision to pre-Act periods; obviously, the parties were not then aware of or bound by any statutory mechanism designed to speed up the process (so as to restrict and control the extent of interest liability).[13] Conversely, pre-Act interest is likely to be inflated because contracting officers then had no deadlines to spur them.

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[12] This use of interest to encourage prompt disposition of claims is also reflected in the Senate Report discussing an earlier version of section 12 which allowed interest from the date the claim accrued. That report stated that "[a]dministrative judges in the agency boards and trial judges at the Court of Claims must be very sensitive when fixing a date from which to start interest charges not to allow undue delay in * * * notification * * * to be of a benefit to the contractor. The contracting officer should know of the claim in a reasonable amount of time * * * *so as to give the contracting officer * * * the opportunity to act so as to limit the dollar exposure in interest.*" Senate Report, *supra* at 32, [1978] U.S. CODE CONG. & AD. NEWS at 5266 (emphasis added). While the date interest begins to run was later amended, *see* Cong. Rec. S 18641 (daily ed. Oct. 12, 1978), Congress' concern to limit exposure to interest remained a significant goal.

[13] No one, so far as we know, contends that these statutory time limits should be retrospectively applied to pre-Act determinations of contracting officers so as to invalidate those which failed to adhere to the later-enacted time limits. Plainly, the entire Act cannot be automatically applied retrospectively to the claims of electing contractors.

Denial of pre-Act interest also harmonizes with the "long-established, deeply-imbedded principle that interest is not allowed on monetary claims against the Federal Government unless Congress (or a contract) plainly authorizes such an addition * * *." *Blake v. Califano*, 626 F.2d 891, 893 (D.C. Cir. 1980). This "entrenched immunity" is a part of sovereign immunity. *United States v. New York Rayon Importing Co.*, 329 U.S. 654, 658–59 (1947). Because there can be no award of interest against the United States in the absence of a "contract [a provision not applicable here] or Act of Congress expressly providing for payment thereof," 28 U.S.C. § 2516(a) (1976), the only way plaintiff can recover interest is if the Contract Disputes Act provides for it. *Cf. United States v. Mescalero Apache Tribe*, 207 Ct. Cl. 369, 388, 518 F.2d 1309, 1322 (1975), *cert. denied*, 425 U.S. 911 (1976). While section 12 does expressly provide for the recovery of interest prospectively, pre-Act interest is not included within the express (or in our view implied) terms of that section. *See* our discussion *supra*. "[T]here is nothing to indicate that Congress affirmatively intended" interest for pre-Act periods. *See Blake v. Califano, supra*, 626 F.2d at 894. In the light of the precept that "limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied," *Soriano v. United States*, 352 U.S. 270, 276 (1957), we should not expand the boundaries of section 12 to cover territory not necessarily or clearly included within its terms and perimeters.[14]

In opposition, plaintiff calls upon the canon that remedial legislation should be liberally construed to advance the remedy of the evil or injustice Congress sought to alleviate. *See Lykes Bros. S.S. Co. v. United States*, 206 Ct. Cl. 354, 375, 513 F.2d 1342, 1353 (1975). Section 12 is obviously remedial in nature, *see* Senate Report *supra* at 32, 1978 U.S. Code Cong. & Ad. News at 5266, but that alone is insufficient to overcome the strong contrary reasons for denying it retroactive pre-Act application. As we have emphasized, there is no good reason to believe that Congress wanted to remedy any pre-Act injustice stemming from inability to recover interest. *See Monroe M. Tapper & Assoc. v. United States*, 222 Ct. Cl. ___, ___, 611 F.2d 354, 360 (1979). This is therefore not a case in which the statutory purpose definitely extends to past transactions as well as the future. That being so, the prospective remedial objective of section 12 is outweighed by the contrary policies we have spelled out.[15]

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[14] In this connection, *see also* our discussion *infra* (Part III), of the principle disfavoring retroactivity of statutes in the absence of a clear indication to the contrary.

III

The Government goes further and urges that no interest at all is recoverable, even after the March 1, 1979 effective date of the Act, because none of the claims was certified pursuant to section 6(c)(1) of the Disputes Act, 41 U.S.C. § 605(c)(1).[16] With respect to the underlying claims in this case, which were all submitted prior to March 1, 1979 (and have already been paid), a similar contention was squarely rejected in *Folk Construction Co. v. United States, supra*, Ct. Cl. No. 99-80C (order of Jan. 16, 1981), *reh'g denied* (order of March 6, 1981), and *Gregory Lumber Co. v. United States, supra*, Ct. Cl. No. 428-80C (order of March 27, 1981). In those cases, the contractor sought to take advantage of the Act's "direct access" provision, allowing suit directly in this court after a contracting officer's adverse decision, without certifying their pre-Act claims. The court ruled in those decisions that, when a contracting officer renders a decision after the effective date of the Act on an uncertified claim submitted prior to that date, the contractor may proceed here under the Act without having to certify.

Folk and *Gregory* are, of course, binding on this panel, and we have no occasion to doubt those rulings or to ask the full court to hear the question.[17] Insofar as defendant says

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[15] See our analogous decision refusing retroactive application to pending cases of the attorney's fee provision of the Civil Service Reform Act of 1978, 5 U.S.C. § 552 *et seq.* (Supp. III 1979). *Nibali v. United States*, 225 Ct. Cl. ____, 634 F.2d 494 (1980). There, as in the current case, the statutory language and history gave little guidance but the purpose of adding the provision for attorney's fees was admittedly remedial. Nevertheless, retroactivity was not allowed.

[16] This subsection provides that:

"[f]or claims of more than $50,000, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable."

[17] As noted, note 5, *supra*, the full court declined to hear both of those cases *en banc*. So far as we can tell, the arguments made here are substantially those made in *Folk* and especially *Gregory*.

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